Presents:

Pro Bono Practice: Practicing Law For Love and Money

Co-Sponsored By:
The West Palm, Broward, and South Florida Chapters of the Federal Bar Association

March 4, 2005
United States District Court
Judge James Lawrence King Building
Jury Assembly Room, 99 N.E. 4th Street,
Miami, FL

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* Additional materials concerning the Prison Litigation Reform Act can be located at the Volunteer Lawyers' Project website located at http://www.flsd.uscourts.gov.

The Volunteer Lawyers' Project for the Southern District of Florida Presents:

PRO BONO PRACTICE: PRACTICING LAW FOR LOVE AND MONEY

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CLE CREDIT: 8 C.L.E.R Credits including 1.5 Ethics Credits

AGENDA

8:15	**Pre-Registration**
8:50	**Welcome and Introduction:** **Judge Jordan and Mag. Judge White**
9:10	**How to Litigate a Civil Rights Case:** **Mike Masinter (Professor of Law, Nova Southeastern Univ.)** Basic overview: preliminary considerations, correct parties, ethical considerations, jurisdiction, elements of cause of action, pleadings, standards for liability absolute and qualified immunity, defenses, remedies, damages, declaratory and injunctive relief, appeals.
11:10	**BREAK**
11:20	**Attorneys Fees and Ethical Considerations:** **Judge Ungaro-Benages and Randall C. Berg (Executive Director, Florida Justice Institute)** Review of procedure to apply for fees, recent change in Local Rules, recent decisions effecting fee awards, tips for practitioners, effect of PLRA on fees and ethical issues involving conflicts of interests and professionalism in fee litigation.
11:50	**LUNCH - Dining With the Judiciary:** **Judge Jordan (moderator) Judge Moreno, Judge Ungaro-Benages, Mag. Judge White, Judge Altonaga, Clarence Maddox** An ideal opportunity to get practice pointers from members of the judiciary on subjects such as the judiciary's approach to handling VLP cases, civil procedure, ethical considerations, revised Local Rules, and recent technological changes in electronic filing. Will also include an extensive question and answer period (Lunch will be provided for $12, paid in advance).
1:20	**Current Trends in Prisoner Civil Rights Litigation:** **John Boston (Director Prisoner Rights Project, Legal Aid Society of New York)** A primer for anyone involved in prisoner civil rights cases. The foremost expert in this area will deal with conditions of confinement litigation focusing on excessive force and deliberate indifference to serious medical needs cases, access to courts, confinement standards, the Prison Litigation Reform Act, and challenges to the act.
2:20	**Life of a Volunteer Lawyers Case:** **Tracy Nichols—Moderator (Holland & Knight) Vance Salter (Hunton & Williams), Ben Reid (Carlton Fields), Frank Zacherl (Shutts & Bowen), Judge Edward Davis (Akerman Senterfitt), Patrick Maier and Bethell Forbes (Volunteer Lawyers' Project)** An overview of the intake, evaluation, and referral of a case by the Volunteer Lawyers Project followed by a discussion of how different law firms which have litigated these cases staff and handle them, their benefit to inexperienced attorneys, and their outcomes.
3:20	**BREAK**
3:30	**Police Misconduct:** **Barbara Heyer (Heyer & Associates)** Basic overview: Actionable conduct, absolute and qualified immunity, individual, supervisory and local government liability, suits against federal officials and the United States Government, investigation and evaluation of the case, damages.
4:30	**END**

Throughout the nine counties and six judicial circuits that comprise the Southern District Court of Florida, there are thousands of citizens who do not have access to attorneys. Without the assistance and advice of counsel, many valid claims may be lost because they are never filed or are not properly prosecuted by inexperienced pro se plaintiffs. Claims that might have been quickly and efficiently resolved through litigation and/or mediation may drag on unnecessarily, wasting the resources of plaintiffs, defendants and the Court. In fiscal year 2003, there were 1,755 pro se filings which made up **25%** of the Court's new civil filings.

The availability of volunteer attorneys can make a substantial improvement in the efficient and fair disposition these pro se cases with a resulting benefit to plaintiffs, defendants, and the Court. With this goal in mind, the VLP and the West Palm, Broward, and South Florida chapters of the Federal Bar Association have collaborated to present this CLE seminar. It is our hope that this seminar will provide attorneys who don't often get the chance to litigate a civil rights claim the necessary information that will assist them when taking a VLP case.

We would also like to thank all of the participants in the program who have contributed their time and effort in making the Volunteer Lawyers' Project a success.

Sincerely,

The Volunteer Lawyers' Project Advisory Board and Staff

Randall c. Berg, Jr.
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Featured Speakers

Randall C. Berg, Jr., is the Executive Director of the Florida Justice Institute, Inc., Miami, a position he has held since 1978 when the Institute was established. The Institute started and directs the Volunteer Lawyers' Project for the Southern District of Florida at the behest of and pursuant to Administrative Order of this Court.

John Boston is the director of the Prisoners' Rights Project of the New York City Legal Aid Society, where he has worked for 29 years, and is co-author of the Prisoners' Self-Help Litigation Manual

Barbara Heyer practices law in the Fort Lauderdale firm of Heyer & Associates, P.A. Ms. Heyer has been involved in the litigation of police misconduct matters throughout the United States. Shereceived her J.D. in 1981 from Nova Southeastern University Shepard Broad Law Center after obtaining her B.A. and M.A. in history from Wayne State University

Michael Masinter is professor of law at the Shepard Broad Law Center, Nova Southeastern university. Professor Masinter received his J.D. from Georgetown University Law Center in 1973. After graduation he worked with Florida Rural Legal Services in Immokalee and Homestead, ultimately becoming its director of litigation, before joining the Nova faculty in 1978. He has remained involved with Legal Services and played a prominent role in the Florida ACLU.

Judge Ungaro-Benages was appointed to the state trial court in 1987 by then Governor Bob Martinez and to the United States District Court for the Southern District of Florida in November 1992, after having been nominated for the position by President Bush and confirmed by the U.S. Senate. Prior to becoming a judge, Judge Ungaro-Benages was a partner in the Miami office of Finley, Kumble, Wagner, Heine & Underberg and, later, a shareholder in Sparber, Shevin, Shapo & Heilbronner, PA. Her practice was mainly in the area of complex commercial litigation, and she handled securities fraud and anti-trust cases, contract disputes and sophisticated real estate litigation matters, among others

How To Litigate A Civil Rights Case

Mike Masinter

*Printed course material from the "Federal Practice Manual For Legal Aid Attorneys", published by the Sargent Shriver National Center On Poverty Law and available on-line at:
www.povertylaw.org/fed_practice_manual/fed_practice_manual_toc.cfm

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ATTORNEY'S FEES AND ETHICAL CONSIDERATIONS IN SECTION 1983 LITIGATION

"*Pro Bono* Practice: Practicing Law for Love and Money"
Volunteer Lawyers' Project for the Southern District of Florida
U.S. District Court
March 4, 2005
Miami, Florida

The Honorable Ursula Ungaro-Benages
Judge, United States District Court

Randall C. Berg, Jr., Esquire
Peter M. Siegel, Esquire
Cullin A. O'Brien, Esq.
Florida Justice Institute, Inc.
Miami, Florida

Full, fair compensation of civil rights lawyers is essential to Congress' scheme of enforcement of the Civil Rights Acts:

> [E]ffective enforcement of [civil rights laws] depends to a large extent upon the action of private citizens, not just government officials. [Congress] also perceived that most victims of civil rights violations lacked the resources to obtain the legal counsel necessary to vindicate their rights through the judicial process. Adequate fee awards are essential to the full enforcement of the civil rights statutes and are an integral part of the remedies necessary to secure compliance with those laws.
>
> Congress further recognized that effective enforcement of civil rights laws depends on fee awards sufficient to attract competent counsel without producing a windfall to the attorneys. To this end it explicitly expressed its intent that the "amount of fees awarded [under the Fees Act] be goerned by the same standards which prevail in other types of equally complex Federal litigation, such as antitrust cases;" and that fee computations result in payments, "as is traditional with attorneys compensated by a fee-paying client, 'for all time reasonably expended on a matter.'" This Court has recognized the standard of reasonableness is to be given a liberal interpretation.

Johnson v. Univ. Col. of Univ. of Ala. in Birmington, 706 F.2d 1205, 1211 (11th Cir. 1983) (citations omitted).

1. **Is There Any Entitlement to a Fee?**

42 U.S.C. § 1988(b) provides that:

> In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, the Religious Freedom Restoration Act of 1993 [42 U.S.C. §2000bb et seq.], or title VI of the Civil Rights Act of 1964 [42 U.S.C. § 2000d et seq.], the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

Section 1988 fee decisions "are generally applicable to all cases in which Congress has authorized an award of fees to a 'prevailing party.'" Hensley v. Eckerhart, 461 U.S. 424, 433 n. 7, 103 S.Ct. 1933, 1939 n.7, 76 L.Ed.2d 40 (1983). There are reportedly several hundred other federal statutes that provide for fees in civil actions.

Where no relief is available under § 1983, no attorney's fees can be awarded under § 1988. National Private Truck Council, Inc. v. Oklahoma Tax Com'n., 515 U.S. 582, 115 S.Ct. 2351, 132 L.Ed.2d 509 (1995).

2. Was a Timely Request Made?

Make sure you comply with the 14 days post judgment provision of Rule 54, Federal Rules of Civil Procedure. But, if you are in the S.D. Fla. you have 30 days to file pursuant to Local Rule 7.3. See ¶ 16, *infra*. Failure to comply may result in loss of entitlement to any attorneys fees. See Zaklama v. Mount Sinai Medical Center, 906 F.2d 645 (11th Cir. 1990) (affirming disallowance of all fees for failure to meet the time requirements of the Southern District's Local Rule).

Also, don't forget to file for costs under Rule 54(d)(1), Federal Rules of Civil Procedure, and Local Rule 7.3, S.D. Fla., at least to the extent you can obtain a cost item that you cannot obtain as part of your fee application [fees to be paid to witnesses, both lay and expert, $40.00 per day, 28 U.S.C. § 1821(b)].

3. Are You the Prevailing Party?

The statutory threshold requirement for a § 1988 attorneys' fee award is to be the "prevailing party." Eligibility for a fee award requires that the plaintiff prevail on "any significant claim affording some of the relief sought." Texas State Teachers v. Garland Indep. School D., 489 U.S. 782, 791, 109 S.Ct. 1486, 1493, 103 L.Ed.2d 866 (1989) (rejecting the view that you must prevail on the "central issue" and achieve "the primary relief sought" and reversing Martin v. Heckler, 773 F.2d 1145, 1149 (11th Cir. 1985)(en banc)); See also Loggerhead Turtle v. County Council, 307 F.3d 1318, 1322, n.4 (11th Cir. 2002). You must have established your entitlement to some relief affecting the behavior of the defendant toward the plaintiff — procedural or evidentiary victories are not enough. Hanrahan v. Hampton, 446 U.S. 754, 100 S.Ct. 1987, 64 L.Ed.2d 670 (1980).

A favorable ruling on an appeal does not make you a prevailing party if, on remand, you fail to obtain declaratory, injunctive or monetary relief. Hewitt v. Helms, 482 U.S. 755, 107 S.Ct. 2672, 96 L.Ed.2d 654 (1987). Hewitt was a challenge to prison disciplinary proceedings. The appellate court held for the prisoner. However, by the time the case returned to the district court, the prisoner was out. Because he did not benefit from the holding of the appellate court, the Supreme Court held he was not a prevailing party. See also Rhodes v. Stewart, 488 U.S. 1, 109 S.Ct. 202, 102 L.Ed.2d 1 (1988)(by the time the district court ruled in favor of the plaintiffs, one plaintiff was dead and the other was no longer in custody — no prevailing party).

A "plaintiff 'prevails' when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff." Farrar v. Hobby, 506 U.S. 103, 113 S.Ct. 566, 572-73, 121 L.Ed.2d 494 (1993). Thus, an award of nominal damages makes you the prevailing party, since a "judgment for damages in any amount, whether compensatory or nominal, modifies the defendant's behavior for the plaintiff's benefit by forcing the defendant to pay an amount of money he otherwise would not pay." 113 S.Ct. at 574. But it may not entitle you to an award of attorneys

fees if the victory is merely technical or insignificant — at least where the only relief sought is monetary relief.

You are not the prevailing party if your case becomes moot. Lewis v. Continental Bank Corp., 494 U.S. 472, 110 S.Ct. 1249, 108 L.Ed.2d 400 (1990) (appellate court judgment vacated by Supreme Court on grounds of mootness); Rhodes v. Stewart, 488 U.S. 1, 109 S.Ct. 202, 102 L.Ed.2d 1 (1988)(favorable declaratory judgment improperly issued after plaintiff's claim became moot).

What about a preliminary injunction? If you ultimately lose on the merits, you are not the prevailing party. Doe v. Busbee, 684 F.2d 1375, 1380 (11th Cir. 1982). If you obtain a preliminary injunction based on a likelihood of success on the merits and the case becomes moot before final judgment, you are the prevailing party. Taylor v. City of Fort Lauderdale, 810 F.2d 1551, 1557-58 (11th Cir. 1987). However, if your injunction was granted only to preserve the status quo, and the case becomes moot, you are not the prevailing party. Libby v. Illinois High Sch. Ass'n., 921 F.2d 96 (7th Cir. 1990).

Under the Prison Litigation Reform Act, 42 U.S.C. § 1997e, even though you become a prevailing party by obtaining a preliminary injunction that does not merely preserve the *status quo*, you must show an actual violation of rights in order to recover attorney's fees. Vanke v. Block, 2003 U.S. App. LEXIS 20774 (9th Cir. 2003); Siripongs v. Davis, 282 F.3d 755 (9th Cir. 2002); Cf. Barnes v. Broward County Sheriff's Office, 190 F.3d 1274, 1279 (11th Cir. 1999) (holding that an Americans with Disabilities Act plaintiff was not a prevailing party for the purposes of attorney's fees because the party did not obtain a"direct benefit" from the injunctive relief).

You are not the prevailing party if you win in the district court and lose in the court of appeals.

4. Can You Prevail Without a Judgment?

A. *Settlement* Fees available only if provided for in the settlement. Maher v. Gagne, 448 U.S. 122, 129, 100 S.Ct. 2570, 65 L.Ed.2d 653 (1980); Fields v. City of Tarpon Springs, 721 F.2d 318, 321-22 (11th Cir. 1983).

B. *Voluntary Cessation of Illegal Activity.* The "catalyst theory" does not justify an award of attorney's fees. Buckhannon Bd. & Care Home v. W. Va. Dep't of Health & Human Res., 532 U.S. 598 (2001). Thus, attorney's fees are not awarded simply because a plaintiff achieves a desired result because the lawsuit brought about a voluntary change in the defendant's conduct. Buckhannon, 532 U.S. at 601. Instead, an award of attorney's fees as a "prevailing party" is justified only by the attainment of some "court-ordered change in the legal relationship between the plaintiff and the defendant." Id. at 604 (internal quotation and citation omitted); See also Smalbein v. City of Daytona Beach, 353 F.3d 901, 904-905 (11th Cir. 2003) .

C. *Non-fee Federal Claim Joined with Fee Claim.* If you lose the fee claim, but prevail on the non-fee claim, no attorney's fees. Finch v. City of Vernon, 877 F.2d 1497, 1507-08 (11th Cir. 1989). However, you are entitled to a fee if you prevail on a non-fee claim that shares either the same legal theory or a common core of facts with a substantial, undecided, non-frivolous fee claim — and the fee-based claim is not reached. Maher v. Gagne, 448 U.S. at 130-31, 100 S.Ct. at 2575; Smith v. Robinson, 468 U.S. 992, 104 S.Ct. 3457, 82 L.Ed.2d 746 (1984).

D. *State-law Claim Joined with Constitutional Fee Claim.* Courts have upheld awards of § 1988 fees to plaintiffs who prevail on supplemental state law claims that arise out of a common nucleus of operative facts. Williams v. Thomas, 692 F.2d 1032, 1036 (5th Cir. 1982). Of course, if you prevail on your state law claim but lose your federal claim, you do not qualify for fees. Finch v. City of Vernon , 877 F.2d 1497, 1507-08 (11th Cir. 1989).

5. Who Can Prevail?

A. *Corporate Plaintiffs.* International Oceanic Enterprises, Inc. v. Menton, 614 F.2d 502, 503 (5th Cir. 1988).

B. *Intervenors.* Ensley Branch N.A.A.C.P. v. Seibels , 31 F.3d 1548, 1582-83 (11th Cir. 1994).

C. *Defendants.* A prevailing defendant can only recover attorneys fees if the lawsuit was "frivolous, unreasonable, or without foundation." Hughes v. Rowe, 449 U.S. 5, 14-16, 101 S.Ct. 173, 178, 66 L.Ed.2d 163 (1980), adopting the standard of Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 98 S.Ct. 694, 54 L.Ed.2d 648 (1978). See Hensley v. Eckerhart, 461 U.S. 424, 429 n. 2, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983)("only where the suit was vexatious, frivolous, or brought to harass or embarrass the defendant."); See also Durrett v. Jenkins Brickyard, Inc., 678 F.2d 911 (11th Cir. 1982); Baker v. Alderman, 158 F.3d 516, 527 (11th Cir. 1998) .

D. *Pro Se Litigants.* No entitlement to fees. Cofield v. City of Atlanta, 648 F.2d 986 (5th Cir. 1981). A pro se lawyer plaintiff is not entitled to feesKay v. Ehrler, 499 U.S. 432, 111 S.Ct. 1435, 113 L.Ed.2d 486 (1991).

E. *Amicus Curiae.* No entitlement to fees. Morales v. Turman, 820 F.2d 728 (5th Cir. 1987).

F. *Independent Action for Fees.* Section 1988 does not provide an independent action for fees. North Carolina Dep't of Transp. v. Crest Street Community Council, Inc., 479 U.S.

6, 107 S.Ct. 336, 93 L.Ed.2d 188 (1986) (can't sue for fees after successful administrative proceedings).

6. Do You Have Standing to Seek Fees?

The fees belong to the client, not to the attorney — only the client has standing to seek them. Evans v. Jeff D., 475 U.S. 717, 730 n. 19, 106 S.Ct. 1531, 1539 n.19, 89 L.Ed.2d 747 (1986). (To help avoid a possible conflict between the attorney and the client if an offer of settlement is made with no fees to be paid, it is suggested that the retainer agreement provide that the client owes the attorney for his or her representation and fees can only be waived at the discretion of the attorney.)

7. Is There Somebody You Can Collect Fees From?

The government is not responsible for attorneys fees awards entered against its employees in their individual capacity. Nor is an official who enjoys any kind of immunity from § 1983 liability personally liable for fees under § 1988. Kentucky v. Graham, 473 U.S. 159, 105 S.Ct. 3099, 87 L.Ed.2d 114 (1985).

The Eleventh Amendment does not bar fees where state officials are sued in their official capacity. Hutto v. Finney, 437 U.S. 678, 98 S.Ct. 2565, 57 L.Ed.2d 522 (1978) (constitutional claim); Maher v. Gagne, 448 U.S. 122, 130-33, 100 S.Ct. 2570, 2576 65 L.Ed.2d 653 (1980)(statutory claim). A state judge against whom declaratory or injunctive relief is entered, is liable for § 1988 fees. Pulliam v. Allen, 466 U.S. 522, 104 S.Ct. 1970, 80 L.Ed.2d 565 (1984).

A governmental official, sued only in his individual capacity, who enjoys qualified immunity from damages, is also exempt from attorney's fees, even if only declaratory or injunctive relief is sought. Miller v. King, 384 F.3d 1248, 1260 (11th Cir. 2004); D'Aguanno v. Gallagher, 50 F.3d 877 (11th Cir. 1995). But that rule of law appears to be inconsistent with the express language of Pulliam.

You cannot recover fees from a defendant intervenor who has not been found to have violated a civil rights law unless the intervention was frivolous, unreasonable, or without foundation. Indep. Federation of Flight Attendants v. Zipes, 491 U.S. 754, 109 S.Ct. 2732, 105 L.Ed.2d 639 (1989). Query, can you recover from the initial defendant the fees incurred in fending off the intervenor?

8. Are There Special Circumstances Suggesting No Award?

A successful civil rights plaintiff "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." Hensley v. Eckerhart, 461 U.S. 424, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983). But, consider the impact of Farrar v. Hobby.

In every Supreme Court case in which the defendants have argued "special circumstances," the argument has been rejected. Washington v. Seattle School District, 458 U.S. 457, 487 n.31

(1982)(plaintiffs were state-funded entities); New York Gaslight Club v. Carey, 447 U.S. 54, 100 S.Ct. 2024, 64 L.Ed.2d 723 (1980)(plaintiffs represented pro bono); Newman v. Piggie Park Enterprises, 390 U.S. 400, 402 (1968)(defendant's good faith); Supreme Court of Virginia v. Consumers Union, etc., 446 U.S. 719, 100 S.Ct. 1967, 64 L.Ed.2d 641 (1980)(same).

Almost all alleged special circumstances have been rejected. See Hall v. Bd. of Sch. Com'rs of Conecuh County, 707 F.2d 464, 465 (11th Cir. 1983) (budgetary problems or scarce resources of private or public defendants); Crowder v. Housing Auth. of Atlanta, 908 F.2d 843, 848-49 (11th Cir. 1990) (plaintiff only seeking injunctive relief); Venegas v. Mitchell, 495 U.S. 82, 110 S.Ct. 1679, 109 L.Ed.2d 74 (1990) (the ability of the plaintiff to pay his counsel); Blanchard v. Bergeron, 489 U.S. 87, 109 S.Ct. 939, 103 L.Ed.2d 67 (1989) (damages action where likelihood of success so great that it will attract counsel on a contingent fee basis); Blum v. Stenson, 465 U.S. 886, 104 S.Ct. 1541, 79 L.Ed.2d 891 (1984) (plaintiff not required to pay counsel or plaintiff represented by legal aid lawyer); Barlow-Gresham Union High School D. 2 v. Mitchell, 940 F.2d 1280, 1285-86 (9th Cir. 1991) (defendant's willingness to enter into early settlement); Lawrence v. Bowsher, 931 F.2d 1579 (D.C. Cir. 1991) (lawsuit benefits only private plaintiff; may even be harmful to the general public); Starks v. George Court Co. Inc., 937 F.2d 311, 315-16 (7th Cir. 1991) (plaintiff pro se with court-appointed counsel).

A nuisance settlement may excuse the defendant from paying fees. Ashley v. Atlantic Richfield Co., 794 F.2d 128, 131-35 (3d Cir. 1986).

Exceptional good faith, consisting generally of a defendant's lack of genuine responsibility for the illegal conduct, coupled with prompt and reasonable efforts to avoid or settle, may serve to avoid fees. See Rose v. Nebraska, 748 F.2d 1258, 1264 (8th Cir. 1984).

A totally inappropriate fee request may justify denial of all fees. Lewis v. Kendrick, 944 F.2d 949 (1st Cir. 1991).

9. Do You Have Adequate Documentation?

A. *Contemporaneous Time Records!!!* So far, not mandatory in the Eleventh Circuit. Reconstructed time records can suffice if supported by other evidence, such as testimony or secondary documentation. Mills by Mills v. Freeman, 118 F.3d 727, 734 (11th Cir. 1997); Jean v. Nelson, 863 F.2d 759, 772 (11th Cir. 1988), aff'd, 496 U.S. 154 (1990).

Where documentation is inadequate, the district court may reduce the award. Hensley v. Eckerhart, 461 U.S. 424, 433, 103 S.Ct. 1933, 1939, 76 L.Ed.2d 40 (1983). See Lipsett v. Blanco, 975 F.2d 934, 938 (1st Cir. 1992)("gauzy generalities" too nebulous to allow the opposing party to dispute their accuracy); In re Donovan, 877 F.2d 982, 995 (D.C. Cir. 1989)(vague descriptions such as "legal issues," "conference re all aspects" and "call re status").

B. *Adequate Task Descriptions.* In Norman v. Housing Auth., 836 F.2d 1292, 1303 (11th Cir. 1988), our Circuit suggested that "the general subject matter of the time expenditures ought to be set out with sufficient particularity so that the district court can assess the time claimed for each activity.... A well-prepared fee petition also would include a summary, grouping the time entries by the nature of the activity or stage of the case." Certainly, the records should show time spent on different claims. Id. "In a case where part of the attorney's efforts are to go uncompensated, the burden is on the attorney to provide sufficient evidence for the court to make a correct division." Accord Oxford Asset Mgmt. v. Jaharis, 297 F.3d 1182, 1196 (11th Cir. 2002).

C. *Burden of Proof and Standard of Review.* The burden of proof is on the party seeking fees. The standard of review is abuse of discretion, with factual findings reviewed under the clearly erroneous standard. Villano v. City of Boynton Beach, 254 F.3d 1302, 1304-1305 (11th Cir. 2001).

10. What's Included in the Fee?

A plaintiff who, bottom line, obtains a favorable judgment on the merits should be entitled to compensation for all work done at all stages of the proceeding without regard to whether the plaintiff prevailed at all stages. Mills by Mills v. Freeman, 118 F.3d 727, 734 (11th Cir. 1997); Lattimore v. Oman Constr., 868 F.2d 437 (11th Cir. 1989).

A. *Services for Which You Can Collect.*

i. Required administrative agency proceedings as a condition to suit. New York Gaslight Club v. Carey, 447 U.S. 54, 100 S.Ct. 2024, 64 L.Ed.2d 723 (1980)(Title VII claim). You can recover fees for advocacy before federal and state administrative agencies aimed at defending and enforcing rights gained in the underlying action. Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, 478 U.S. 546, 106 S.Ct. 3088, 92 L.Ed.2d 439 (1986) (Delaware Valley I).

ii. *Appellate Work.* If you prevail at the district court level and successfully defend your victory on appeal, you are entitled to fees for that work, including work defending an award of attorney's fees, even if the appellate court reduces the amount. Lattimore v. Oman Const., 868 F.2d 437, 440 (11th Cir. 1989). So long as you maintain at least some of your victory, you should be entitled to fees for all your appellate work. Toussant v. McCarthy, 826 F.2d 901, 904 (9th Cir. 1987). However, if you are successful at the district court level and then appeal, seeking even greater relief, but do not win greater relief on appeal, you are not entitled to fees for the appellate work. Ustrak v. Fairman, 851 F.2d 983, 990 (7th Cir. 1988).

iii. *Fees on Fees.* Work on the fee petition, including litigation over the issue of fees. Johnson v. Univ. Col. of Univ. of Ala. in Birmington, 706 F.2d 1205, 1207 (11th Cir. 1983).

B. *What is Excluded?*

i. Time spent on unsuccessful issue or matters that are clearly severable from successful matters. Corder v. Gates, 947 F.2d 374, 379 (9th Cir. 1991). On appeal, if you successfully defend you victory below, but lose a cross appeal, you are not entitled to fees for the work on the cross appeal. Connor v. City of Santa Rosa, 897 F.2d 1487, 1494 (9th Cir. 1990).

ii. Optional pre-suit, state administrative proceedings. Webb v. Board of Educ. of Dyer County, Tenn., 471 U.S. 234, 105 S.Ct. 1923, 85 L.Ed.2d 233 (1985). Webb suggests that on a showing that some of the time spent in the administrative proceeding was equivalent to time which would have had to be spent in the litigation, compensation is permissible.

C. *What Non-Attorney Costs Are Included?*

i. Paralegals and Law Clerks. The work of paralegals and law clerks is compensable at market rates. Missouri v. Jenkins, 491 U.S. 274, 109 S.Ct. 2463, 2469-72, 105 L.Ed.2d 229 (1989).

ii. Other Expenses. With the exception of routine office overhead normally absorbed by the practicing attorney, all reasonable expenses [except expert witness fees, the big one] incurred in case preparation, during the course of litigation, or as an aspect of settlement of the case may be taxed as costs under section 1988' and `the standard of reasonableness is to be given a liberal interpretation. N.A.A.C.P. v. City of Evergreen, 812 F.2d 1332, 1337 (11th Cir. 1987), citing Dowell v. City of Apopka, 698 F.2d 1181, 1192 (11th Cir. 1983).

D. *What Costs Are Excluded?*

i. Expert Witnesses. No, where the only basis is § 1988. West Virginia University Hosps. v. Casey, 499 U.S. 83, 111 S.Ct. 1138, 113 L.Ed.2d 68 (1991). Many other fee shifting statutes, however, do allow the recovery of expert witness fees.

ii. Ordinary secretarial expenses and routine overhead.

11. Method of Calculation

The Supreme Court held in Farrar v. Hobby, 113 S.Ct. at 575, 121 L.Ed.2d 494, where the plaintiff obtained a nominal damages award of $1 after seeking $17-million, that "In some circumstances, even a plaintiff who formally 'prevails' under § 1988 should receive no attorney's fees at all" and that a "plaintiff who seeks compensatory damages but receives no more than nominal damages is often such a prevailing party."

A. *The Lodestar.* The starting point is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate. Hensley v. Eckerhart, 461 U.S. 424, 433, 103 S.Ct. 1933, 1939, 76 L.Ed.2d 40 (1983). The general method is to first calculate the lodestar and then determine whether the lodestar should be adjusted upward or downward. See Norman v. Housing Authority of City of Montgomery, 836 F.2d 1292 (11th Cir. 1988).

In Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 717-19 (5th Cir. 1974), the former Fifth Circuit adopted a twelve-factor method, drawn from the ABA's Code of Professional Responsibility, Disciplinary Rule 2-106, for determining a reasonable fee under § 1988. See Norman v Housing Authority of Montgomery, 836 F.2d 1292, 199-1301 (11th Cir. 1988), for a general discussion of how attorneys fees are to be calculated in this Circuit.

The traditional lodestar factors are (1) the time and labor required, (2) the novelty and difficulty of the issues, (3) the skill requisite to perform the legal service properly, (4) the preclusion of other employment due to acceptance of the case, (5) the customary fee, (6) whether fee is fixed or contingent, (7) the experience, reputation and ability of the attorneys, (8) time limitations imposed by the client or the circumstances, (9), the results obtained, (10) the undesirability of the case, (11) the nature and length of the professional relationship with the client, and (12) awards in similar cases.

B. *Hours Reasonably Expended — "Billing Judgment".*

i. Tasks necessary or useful to the litigation. The issue "is not whether hindsight vindicates an attorney's time expenditure, but whether at the time the work was performed, a reasonable attorney would have engaged in similar time expenditures." Grant v. Martinez, 973 F.2d 96, 99 (2d Cir. 1992), cert. denied, 113 S.Ct. 978 (1993).

a. Pre-litigation Activities. Webb v. Board of Educ. of Dyer County, Tenn., 471 U.S. 234, 105 S.Ct. 1923, 85 L.Ed.2d 233 (1985).

b. Attorney discussion and strategy conferences. City of Riverside v. Rivera, 477 U.S. 561, 573 n. 6, 106 S.Ct. 2686 n. 6, 91 L.Ed.2d 466 (1986)(197 hours of discussion between co-counsel).

c. Travel. ACLU v. Barnes, 168 F.3d 423, 433 (11th Cir. 1999); Johnson v. Univ. Col. of Univ. of Ala.in Birmingham, 706 F.2d 1205, 1208 (11th Cir. 1983).

d. Lobbying and Public Relations Activities. Dillard v. City of Greensboro , 213 F.3d 1347, 1356 n.10 (11th Cir. 2000); Brooks v. Georgia State Bd. of Elections, 997 F.2d 857 (11th Cir. 1993); Glover v. Johnson, 934 F.2d 703, 717 (6th Cir. 1991); Davis v. San Francisco, 976 F.2d 1536, 1545 (9th Cir. 1992).

e. Prefiling work. Dowdell v. City of Apopka , 698 F.2d 1181, 1192 (11th Cir. 1983).

ii. Excessive, redundant or otherwise unnecessary work.

a. Duplication of Service. It is not always unreasonable for two attorneys to be doing the same work. Compare Jones v. Central Soya Company, Inc., 748 F.2d 586, 594 (11th Cir. 1984) (No abuse of discretion for the district court to hold that "it was not unreasonable for the plaintiff to have been represented at trial by two experienced attorneys. The defendant was represented at the trial by house counsel and trial counsel, although house counsel did not participate actively in the litigation.") (internal quotation and footnote omitted), with ACLU v. Barnes, 168 F.3d 423, 433-435 (11th Cir. 1999) (holding that billing for "the presence of four attorneys at the demonstration was patently excessive," and that "the district court abused its discretion by not excluding as excessive any of the hours billed by the four attorneys for preparing and attending the status conference.")

b. Excessive Total Time considering the difficulty of the case.

c. Excessive time for a particular task.

d. Use of too many attorneys.

e. Too many conferences.

f. Performance of Clerical or Secretarial tasks by lawyers.

g. Continuing legal education costs or the time for replacement attorneys to learn the case.

iii. The novelty and difficulty of a case are reflected in the number of hours reasonably required. Blum v. Stenson, 465 U.S. 886, 898, 104 S.Ct. 1541, 1549, 79 L.Ed.2d 891 (1984).

C. *Hourly Rate.* "A reasonable hourly rate is the prevailing market rate in the relevant legal community for similar services by lawyers of reasonably comparable skills, experience and reputation." Norman v Housing Authority of Montgomery, 836 F.2d 1292, 1299 (11th Cir. 1988); See also Dillard v. City of Greensboro, 213 F.3d 1347, 1354 (11th Cir. 2000).

The hourly rate should be fixed "according to rates customarily charged for similarly complex litigation, and is not to be limited by the amounts customarily charged in action brought under the same statute." Wadford v. Hickler, 765 F.2d 1562, 1568 (11th Cir. 1985). Because few attorneys represent civil rights plaintiffs on an hourly basis, proof may need to come from analogous contexts. Norman, 836 F.2d at 1300.

The best evidence of the rates customarily charged in "similar" litigation is the normal non-contingent hourly billing rates of the attorneys representing the plaintiff or plaintiffs. However, counsel employed by not-for-profit law firms usually do not have a normal billing rate. Based on their experience and skill, such attorneys are entitled to the same fees as if they were private attorneys engaged in non-contingency work in the relevant legal market. Blum v. Stenson, 465 U.S. 886, 104 S.Ct. 1541, 79 L.Ed.2d 891 (1984).

i. *PLRA Current Hourly Rate.* The Prison Litigation Reform Act at 42 U.S.C. § 1997e(d)(3) caps attorney fees at 150% of the CJA hourly rate established under 18 U.S.C. § 3006A. The relevant statutes provide that the Judicial Conference "establishes" the maximum rate under § 3006A. The Conference has established $113 per hour as the current hourly rate for all districts for both in- and out-of-court work. See, Report of the Proceedings of the Judicial Conference of the U.S., Sept. 19, 2000. We think the better argument is that the PLRA rate per hour is based on the rate established by the Judicial Conference, not the amount actually appropriated by Congress to compensate court-appointed counsel in CJA criminal proceedings. Webb v. ADA County, 285 F.3d 829 (9th Cir. 2002) *cert. denied*, 537 U.S. 948 (2002); Hadix v. Johnson, _ F.3d _, 2005 WL 433192 (6th Cir. 2005). One judge in the S.D. Fla. has ruled that under § 1997e(d)(3), the PLRA current rate is $169.50 per hour for all PLRA cases. Carruthers v. Jenne, Case No. 76-CV-06068-Hoeveler (slip opinion).

D. *Local Rates vs. Out-of-Town Rates.* Local rates absent demonstration of unavailability of less expensive local counsel able to handle case. ACLU v. Barnes, 168 F.3d 423, 433 (11th Cir. 1999).

E. *Variation in Rate by Type of Services.* Some courts have awarded different rates by type of service. Leroy v. City of Houston, 906 F.2d 1068 (5th Cir. 1990). Most, however, award a flat rate. See, e.g., Davis v. San Francisco, 976 F.2d 1536 (9th Cir. 1992).

F. *Awards in Similar Cases.* Norman, 836 F.2d at 1299.

G. *Current vs. Historic Rates.* The use of current rates, or an upward adjustment to the lodestar, is used to reflect the substantial delay in payment. Either method is authorized by Missouri v. Jenkins, 491 U.S. 274, 278-84, 109 S.Ct. 2463, 2466-69, 105 L.Ed.2d 229 (1989).

H. *Adjustments to the Lodestar.*

i. Contingency enhancements. No. Burlington v. Dague, 505 U.S. 557, 112 S.Ct. 2638, 120 L.Ed.2d 449 (1992). Consider whether the contingent nature of your employment has a bearing on the reasonable hourly rate. For the majority, Justice Scalia said in Dague:

> The risk of loss in a particular case (and, therefore, the attorney's contingent risk) is the product of two factors: (1) the legal and factual merits of the claim, and (2) the difficulty of establishing those merits. The second factor, however, is ordinarily reflected in the lodestar -- either in the number of hours expended to overcome the difficulty, or in the higher hourly rate of the attorney skilled and experienced to do so.

112 S.Ct. at 2641 (emphasis added).

ii. Quality or Success Enhancements. Not likely. Blum v. Stenson, 465 U.S. 886, 898-901, 104 S.Ct. 1541, 1548-50, 79 L.Ed.2d 891 (1984). See also, Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, 478 U.S. 546, 106 S.Ct. 3088, 92 L.Ed.2d 439 (1986).

iii. Novel or Complex Issues. This factor is reflected in the lodestaPennsylvania v. Delaware Valley Citizens' Council for Clean Air, 478 U.S. 546, 106 S.Ct. 3088, 92 L.Ed.2d 439 (1986); Blum v. Stenson, 465 U.S. 886, 104 S.Ct. 1541, 79 L.Ed.2d 891 (1984).

iii. Delay in Payment Adjustments. Where historic rates have been used, courts can grant an upward adjustment. See Gaines v. Dougherty Country Bd. of Educ., 775 F.2d 1565 (11th Cir. 1985). The alternative is to use current rates.Missouri v. Jenkins, 491 U.S. 274, 109 S.Ct. 2463 105 L.Ed.2d 229 (1989). However, delay in payment adjustment not available against the United States. Library of Congress v. Shaw, 478 U.S. 310, 106 S.Ct. 2957, 92 L.Ed.2d 250 (1986).

iv. Downward Adjustments for Limited Success.

a. Unrelated Claims. Hours spent on unsuccessful claims which are "wholly unrelated" in law and in fact to the successful claims, must be totally eliminated. Then, a further reduction should be imposed where the plaintiff has achieved only "limited success" on the remaining unrelated claims. Hensley v. Eckerhart, 461 U.S. 424, 434-39, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983). See Goodson v. City of Atlanta, 763 F.2d 1381 (11th Cir. 1985); Trezevant v. City of Tampa, 741 F.2d 336 (11th Cir. 1984); Williams v. Roberts, 904 F.2d 634, 640 (11th Cir. 1990).

b. Partial Success, one Claim. Anything past nominal damages should entitle the prevailing plaintiff to a full recovery of attorney's fees.

v. Downward Adjustment Where Fees Far Exceed Recovery. Not yet, at least where more than nominal damages are recovered. City of Riverside v. Rivera, 477 U.S. 561, 106 S.Ct. 2686, 91 L.Ed.2d 466 (1986) (fee award of $245,456.25 affirmed where damage award totaled $33,500). See Mckenzie v. Cooper, Levins & Pastko, Inc., 990 F.2d 1183 (11th Cir. 1993)($100,000 lodestar award for $9,000 Title VII back pay award).

I. *Contingency Fees and Fee Shifting.* A § 1988 fee award is not limited to the amount provided by the contingent fee arrangement between client and lawyer. Blanchard v. Bergeron, 489 U.S. 87, 109 S.Ct. 939, 103 L.Ed.2d 67 (1989). And the attorney is entitled to his contingent fee percentage, even if the percentage is more than the § 1988 award. Venegas v. Mitchell, 495 U.S. 82, 110 S.Ct. 1679, 109 L.Ed.2d 74 (1990).

In PLRA cases seeking damages only, 25% of judgment must be used to pay the attorneys' fee claim. 42 U.S.C. § 1997e(d)(2). And defendants cannot be made to pay attorneys' fees greater than 150% of a money judgment. Id.; See Foulk v. Charrier, 262 F.3d 687 (8th Cir. 2001).

J. *Interest, Post-judgment, on Both the Fee and Litigation Expenses Award.* Fields v. City of Tarpon Springs, 721 F.2d 318, 322 (11th Cir. 1983).

12. Interim Fees

Interim fee awards are authorized where the plaintiff, at an interlocutory stage of the proceedings, has obtained a successful final disposition of some aspect of the merits of his claim. Hanrahan v. Hampton, 446 U.S. 754, 100 S.Ct. 1987, 64 L.Ed.2d 670 (1980). A preliminary injunction is not enough. Deerfield Medical Center v. City of Deerfield Beach, 661 F.2d 328, 339 (5th Cir. 1981). If your victory is eventually reversed, you may be required to repay the fee.

13. Offers of Judgment

Rule 68, Federal Rules of Civil Procedure, applies and can serve to limit your recovery. Marek v. Chesny, 473 U.S. 1, 105 S.Ct. 3012, 87 L.Ed.2d 1 (1985). If the Rule 68 Offer of Judgment does not state that § 1988 fees are included, the court must determine the amount of the fees that have accrued as of the date of the offer.

14. Collection from Multiple Defendants

Several approaches. Apportionment based on relative fault or time expended by plaintiff's counsel against each defendant. Council for Periodical Distributors Ass'ns v. Evans, 827 F.2d 1483, 1487 (11th Cir. 1983). Or, joint and several liability. Riddell v. National Democratic Party, 712 F.2d 165, 168-69 (5th Cir. 1983), contra, Knights of Ku Klux Klan v. East Baton Rouge Parish School Board, 735 F.2d 895, 901 (5th Cir. 1984). See Dean v. Gladney, 621 F.2d 1331, 1340 (5th Cir. 1980), cert. denied, 450 U.S. 983 (1981); Grendel's Den, Inc. v. Larkin, 749 F.2d 945, 959 (1st Cir. 1984).

15. Federal Fees in State Court.

Section 1988 attorney's fees are available for § 1983 claims litigated in state courts. Maine v. Thiboutot, 448 U.S. 1, 100 S.Ct. 2502, 65 L.Ed.2d 555 (1980).

16. Pending Revisions to Local Rule 7.3, S.D. Fla. (effective April 15, 2005):

RULE 7.3 ATTORNEYS FEES AND COSTS

A. Upon Entry of Final Judgment or Order. Any motion for attorneys fees ~~and/or to tax costs~~ must specify: the judgment and the statute, rule, or other grounds entitling the moving party to the award; must state the amount or provide a fair estimate of the amount sought; shall disclose the terms of any agreement with respect to fees to be paid for the services for which the claim is made; shall be supported with ~~particularity~~ a detailed description of hours reasonably expended, the hourly rate and its basis; a detailed description of all reimbursable expenses; shall be verified; and shall be filed, along with an affidavit of an expert witness, and served within 30 days of entry of Final Judgment or other appealable order ~~which~~ that gives rise to a right to attorneys fees ~~or costs~~. Any such motion shall be accompanied by a certification that counsel has fully reviewed the time records and supporting data and that the motion is well grounded in fact and justified. A bill to tax costs pursuant to 28 U.S.C. § 1920 shall be filed and served within 30 days of entry of Final Judgment or other appealable order which gives rise to a right to tax costs. ~~In addition, counsel~~ Prior to filing a motion for attorneys fee or bill to tax costs, counsel shall confer with opposing counsel and make a certified statement in the motion or bill in accordance with Local Rule 7.1.A.3. ~~for the opposing party and shall file with the Court, within three (3) days of the motion, a statement certifying that counsel has conferred with counsel for the opposing party in a good faith effort to resolve by~~

~~agreement the motion, the results thereof and~~ The motion or bill shall also state whether a hearing is requested. The prospects or pendency of supplemental review or appellate proceedings shall not toll or otherwise extend the time for filing of a motion for fees ~~and/~~or bill to tax costs with the district court.

B. Prior to Entry of Final Judgment. Any motion for attorneys fees ~~and/~~ or bill to tax costs made before entry of final judgment or other appealable order must specify the statute, rule, or other grounds entitling the moving party to the award; must state the amount or provide a fair estimate of the amount sought; shall disclose the terms of any agreement with respect to fees to be paid for the services for which the claim is made; shall be supported with ~~particularity~~ a detailed description of hours reasonably expended, the hourly rate and its basis; a detailed description of all reimbursable expenses; and shall be verified along with an affidavit of an expert witness. Any such motion shall be accompanied by certification that counsel has fully reviewed the time records and supporting data and that the motion is well grounded in fact and justified. ~~In addition, counsel~~ Prior to filing a motion for attorneys fee or bill to tax costs, counsel filing the motion shall confer with opposing counsel and make a certified statement in the motion or bill in accordance with Local Rule 7.1.A.3. ~~for the opposing party and shall file with the Court, within three (3) days of the motion, a statement certifying that counsel has conferred with counsel for the opposing party in a good faith effort to resolve by agreement the motion, the results thereof and~~ The motion or bill shall also state whether a hearing is requested.

Effective Dec. 1, 1994; amended effective April 15, 1999; April 15, 2001; April 15, 2005.

Authority

(1993) Former Local Rule 10F, renumbered per Model Rules.

Comments

(1993) There are considerable modifications to the existing rule, including an attorney's certification, plus a requirement to confer in 3 days.

The authority of the Judges to regulate the mechanics of fee applications is clear. *See White v. New Hampshire Dept. of Employment*, 455 U.S. 445 (1982); *Knighton v. Watkins*, 616 F.2d 795 (5th Cir.1980); *Brown v. City of Palmetto*, 681 F.2d 1325 (11th Cir.1982); *Zaklama v. Mount Sinai Med. Center*, 906 F.2d 645 (11th Cir.1990).

(1994) The changes are designed to make certain portions of the local rule (but not the time period for filing) consistent with Fed.R.Civ.P. 54(d)(2)(B), as amended effective December 1, 1993, and to correct grammatical or typographical errors which appear in the current rule. Rule 54(d)(2)(B) as amended leaves the disclosure of the fee agreement to the discretion of the Court. This local rule directs disclosure in every case.

(1999) The rule has been amended to clarify that a motion for fees and costs must only be filed when a judgment or appealable order has been entered in the matter. A motion for fees and costs may be made before such a judgment or order has been entered where appropriate, such as when sanctions have been awarded during the course of such proceeding. However, in no event may a motion for fees or costs be made later than the date provided for in this rule.

(2001) Applicability to interim fee applications clarified.

(2005) The changes are designed to provide attorneys with more particularized information as to what must be included and filed contemporaneously with a motion for attorneys fees. See *Norman v. Housing Auth.*, 836 F.2d 1292 (11th Cir. 1988) and progeny. The amendment to the rule separates a bill to tax costs from that of a motion for attorneys fees. The changes also requires attorneys to confer in good faith prior to the filing of a motion for attorneys fees or a bill to tax costs which is a change from the 1993 amendment.

USEFUL REFERENCE MATERIALS

The Practicing Law Institute (PLI) annual handbook, Section 1983 Civil Rights Litigation and Attorneys' Fees is a two or three volume, inexpensive, comprehensive look at § 1983 and § 1988 cases.

Awarding Attorneys' Fees and Managing Fee Litigation, Federal Judicial Center (1994).

Overview of Prisoners' Rights

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Revised for Volunteer Lawyers' Program
United States District Court for the Southern District of Florida

March 4, 2005

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Overview of Prisoners' Rights

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Introduction

What follows is a sort of map of most of the issues concerning prison conditions and practices that are commonly litigated in federal court. It was initially cobbled together for a Second Circuit audience in large part from other things I have written and has been hastily updated and reoriented toward the Eleventh Circuit. As a result the level of detail differs widely among sections, the updating is similarly uneven, and there are formatting glitches in places.

I. Conditions of Confinement

The primary guarantor of decent living conditions for prisoners is the Eighth Amendment's prohibition of cruel and unusual punishments.

A. The subjective element

Eighth Amendment claims require proof of a subjective element or state of mind requirement, according to the Supreme Court, because the word "punishment" necessarily implies such a requirement.[1] So far the Court has identified two different state of mind requirements in Eighth Amendment cases:

1. Conditions of confinement cases: deliberate indifference

In cases about conditions of confinement, the plaintiff must show "deliberate indifference."[2] Indifference to what? That's the objective prong of the Eighth Amendment standard, discussed below.

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[1] Wilson v. Seiter, 501 U.S. 294, 298-99 (1991); *see* Farmer v. Brennan, 511 U.S. 825, 854-55 (1994) (Blackmun, J., concurring in result) (exposing fallacy of that reasoning); Coleman v. Wilson, 912 F.Supp. 1282, 1299 n. 11 (E.D.Cal. 1995) (same).

[2] Farmer v. Brennan, 511 U.S. at 834.

Deliberate indifference means subjective or criminal law recklessness, *i.e.*, disregard for known risks, not risks the defendant should have known about.[3] On the other hand, the obviousness of a risk may support an inference of actual knowledge,[4] as may other relevant circumstances.[5] However, the Eleventh Circuit has held that expert testimony concerning what a defendant should have known does not support an inference as to what he or she did know.[6]

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[3] *Farmer*, 511 U.S. at 839-43; *see* Cotton v. Jenne, 326 F.3d 1352, 1358-59 (11th Cir. 2003) (holding staff members' knowledge that inmates in a unit were so mentally ill they were segregated from other prisoners, and that a prisoner who assaulted the decedent posed a risk based on prior "violent, schizophrenic" outbursts, constituted actual knowledge such that it was deliberately indifferent for staff to play computer games rather than watch the unit on their video monitor).

The Eleventh Circuit has said that "deliberate indifference has three components: (1) subjective knowledge of a risk of serious harm; (2) disregard of that risk; (3) by conduct that is more than mere negligence." Chandler v. Crosby, 379 F.3d 1278, 1290 n.21 (11th Cir. 2004), *quoting* Farrow v. West, 320 F.3d 1235, 1245 (11th Cir. 2003).

[4] *Farmer*, 511 U.S. at 842-43; *see* Lolli v. County of Orange, 351 F.3d 410, 420 (9th Cir. 2003) (holding officers' indifference to a diabetic prisoner's extreme behavior, sickly appearance, and explicit statements about his condition could support a finding of actual knowledge of a serious risk); Gates v. Cook, 376 F.3d 323, 343 (5th Cir. 2004) (holding deliberate indifference finding supported by "obvious and pervasive nature" of challenged conditions); Steele v. Shah, 87 F.3d 1266, 1270 (11th Cir. 1996) (denying summary judgment to prison doctor who had been told the plaintiff received psychiatric medication in part because of suicide risk, but discontinued it based on a cursory interview without reviewing medical records); Haley v. Gross, 86 F.3d 630, 641 (7th Cir. 1996). *But see* Campbell v. Sikes, 169 F.3d 1353 (11th Cir. 1999) (dismissing medication discontinuation case because plaintiff's condition was not so obvious that knowledge could be inferred).

[5] Hope v. Pelzer, 536 U.S. 730, 738 n.8 (2002) (particular defendants' awareness of a risk of harm "may be evaluated in part by considering the pattern of treatment that inmates generally received" as a result of the challenged practice); LaMarca v. Turner, 995 F.2d 1526, 1536 n. 21 (11th Cir. 1993) (warden's "supervisory role and the insular character of prison communities" supported inference of knowledge of "apparent" conditions), *cert. denied*, 510 U.S. 1164 (1994).

[6] Campbell v. Sikes, 169 F.3d 1353, 1368-73 (11th Cir. 1999). This holding is contrary to that of some other courts. *See* LeMarbe v. Wisneski, 266 F.3d 429, 436 (6th Cir. 2001) (holding testimony as to what any medical specialist would have known raised a jury issue as to defendant specialist's actual knowledge), *cert. denied*, 535 U.S. 1056 (2002); Moore v. Duffy, 255 F.3d 543, 545 (8th Cir. 2001) (stating in dictum that expert testimony may establish that a prisoner's medical treatment deviated so far from professional standards as to constitute deliberate indifference).

Purposefully avoiding knowledge may also amount to deliberate indifference.[7]

A defendant need not have knowledge of a specific risk to a specific individual from a specific source; *e.g.*, in an inmate-inmate assault case, "it does not matter whether the risk comes from a single source or multiple sources, any more than it matters whether a prisoner faces an excessive risk of attack for reasons personal to him or because all prisoners in his situation face such a risk."[8]

Injunctive cases are official capacity cases and are "in all respects other than name, to be treated as a suit against the entity."[9] In them the focus may be on "the institution's historical

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[7] *Farmer*, 511 U.S. at 843 n. 8; *see* Sanchez v. Taggart, 144 F.3d 1154, 1156 (8th Cir. 1998) (failure to try to verify claim of medical inability to perform work assignment supported deliberate indifference finding); Wallis v. Baldwin, 70 F.3d 1074, 1077 (9th Cir. 1995) (prison officials who had information about possible asbestos contamination had a duty to inspect before sending unprotected work crews to the location).

[8] *Farmer*, 511 U.S. at 843; *see* Greene v. Bowles, 361 F.3d 290, 294 (6th Cir. 2004) (holding that a transsexual prisoner could recover for assault by a known "predatory inmate" either because leaving her in a unit containing high-security inmates threatened her safety, or because placing that inmate in protective custody created a risk for its occupants generally); Marsh v. Butler County, Ala., 268 F.3d 1014, 1028-30 (11th Cir. 2001) (en banc) (holding prisoners assaulted in a county jail with no functioning cell locks or audio or visual surveillance, so dilapidated that inmates made weapons from pieces of the building, stated a claim against the county; similar allegations plus lack of segregation of violent from nonviolent inmates or other classification, crowding, understaffing, lack of head counts, lack of staff surveillance in housing areas, lack of mental health screening, and lack of discipline for violent inmates stated a claim against the sheriff); Jensen v. Clarke, 94 F.3d 1191 (8th Cir. 1996) (affirming injunction based on generalized increase in violence attributed to random assignment of cellmates); Hayes v. New York City Dept. of Correction, 84 F.3d 614, 621 (2d Cir. 1996) (prisoner's refusal to name his enemies to prison staff was not outcome determinative if staff knew of risk to him); LaMarca v. Turner, 995 F.2d at 1535 (liability can be based on "general danger arising from a prison environment that both stimulated and condoned violence"); Coleman v. Wilson, 912 F.Supp. 1282, 1316 (E.D.Cal. 1995) (risk of harm from systemic medical care deficiencies is obvious); Abrams v. Hunter, 910 F.Supp. 620, 625 (M.D.Fla. 1995) (acknowledging potential liability based on awareness of generalized, substantial risk of serious harm from inmate violence), *aff'd*, 100 F.3d 971 (11th Cir. 1996); Knowles v. New York City Dept. of Corrections, 904 F.Supp. 217, 221 (S.D.N.Y. 1995) (prison officials' knowledge of an ethnic "war" among inmates, that a Hispanic inmate who had been cut had been transferred to plaintiff's jail, and that plaintiff was part of a group at risk because of his accent and appearance was sufficient to withstand summary judgment).

[9] Kentucky v. Graham, 473 U.S. 159, 166 (1985).

indifference" rather than the state of knowledge and response of a particular individual.[10]

Deliberate indifference is negated if prison officials "responded reasonably to the risk, even if the harm ultimately was not averted."[11] However, actions that are "not adequate given the known risk" do not defeat liability.[12]

2. Use of force cases: malicious and sadistic treatment

A stronger showing of intent is required in use of force cases: "When prison officials maliciously and sadistically use force to cause harm, contemporary standards of decency are always violated."[13] The rationale for requiring such a showing is the need to balance restoration of security and order against prisoners' rights and the need to act quickly and decisively.[14] However, the applicability of that standard does not turn on the existence of a genuine security need in a particular case; it applies in use of force cases even if it appears there was no genuine security need for force (as *Hudson v. McMillian* itself showed), and the malicious and sadistic standard has generally not been extended to security-related matters other than the direct and

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[10] LaMarca v. Turner, 995 F.2d at 1542; *accord*, Alberti v. Sheriff of Harris County, Tex., 978 F.2d 893, 894-95 (5th Cir. 1992) (deliberate indifference supported by evidence "that the state knew" that refusal to accept felons caused serious local jail crowding); Terry v. Hill, 232 F.Supp.2d 934, 944 (E.D.Ark. 2002).

[11] *Farmer*, 511 U.S. at 844; *accord*, Erickson v. Holloway, 77 F.3d 1078, 1080-81 (8th Cir. 1996) (officer who learned of threat and notified officer on next shift before leaving was not deliberately indifferent); LaMarca v. Turner, 995 F.2d at 1535 ("if an official attempts to remedy a constitutionally deficient prison condition, but fails in that endeavor, he cannot be deliberately indifferent unless he knows of, but disregards, an appropriate and sufficient alternative").

[12] Riley v. Olk-Long, 282 F.3d 592, 597 (8th Cir. 2002); *accord*, Benjamin v. Fraser, 343 F.3d 35, 51-52 (2d Cir. 2003) (holding "largely ineffective" remedial efforts did not defeat liability for long-standing deficiences; detainee case); Jensen v. Clarke, 94 F.3d 1191, 1200-01 (8th Cir. 1996) (injunction was appropriate despite defendants' post-complaint actions); Hayes v. New York City Dept. of Correction, 84 F.3d 614, 621 (2d Cir. 1996) (official response that did not include transferring the plaintiff or issuing a timely separation order did not defeat liability as a matter of law); Coleman v. Wilson, 912 F.Supp. 1282, 1319 (E.D.Cal. 1995) (". . . [P]atently ineffective gestures purportedly directed towards remedying objectively unconstitutional conditions do not prove a lack of deliberate indifference, they demonstrate it.")

[13] Hudson v. McMillian, 503 U.S. 1, 9 (1992); *see* Johnson v. Breeden, 280 F.3d 1308, 1313-16 (11th Cir. 2002) (quoting and discussing jury instructions).

[14] *Hudson*, 503 U.S. at 7.

immediate use of force by staff.[15] Thus, claims that supervisory officials have failed to train, supervise, investigate, discipline, or otherwise control their subordinates' use of force are subject to the deliberate indifference standard,[16] as are "bystander liability" claims that staff failed to intervene in excessive force by other staff.[17] The same is true of security-related policy decisions not involving the use of force[18] and even of uses of force that do not involve an immediate need to restore security and order.[19] Inmate-inmate assaults that pose security risks are also governed by the deliberate indifference standard.[20]

3. Calculated harassment unrelated to prison needs

The Supreme Court has held that cell searches amounting to "calculated harassment unrelated to prison needs" may constitute cruel and unusual punishment in violation of the Eighth Amendment.[21] Though the Court has not mentioned this holding in 20 years, it is still

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[15] *See Farmer*, 511 U.S. at 835 (stating that the deliberate indifference standard is inappropriate in "*one class* of prison cases: when 'officials stand accused of using excessive physical force.'") (emphasis supplied).

[16] Blyden v. Mancusi, 186 F.3d 252, 264 (2d Cir. 1999); Madrid v. Gomez, 889 F.Supp. 1146, 1249 (N.D.Cal. 1995).

[17] Buckner v. Hollins, 983 F.2d 119, 122 (8th Cir. 1993).

[18] Trammell v. Keane, 338 F.3d 155, 162-63 (2d Cir. 2003) (applying deliberate indifference standard to extreme disciplinary measures imposed on a disruptive prisoner because they were "preplanned and monitored"); Jordan v. Gardner, 986 F.2d 1521, 1527, 1529 (9th Cir. 1993) (en banc) (holding that a search practice, even though nominally security-related, was not governed by the malicious and sadistic standard because its security justification was not legitimate, it had not been adopted under time constraints, and it routinely inflicted pain on prisoners).

[19] Hope v. Pelzer, 536 U.S. 730, 737-38 (2002) (applying deliberate indifference standard to "hitching post" restraint procedure used after any immediate security risk had abated); Coleman v. Wilson, 912 F.Supp. 1282, 1321-22 (E.D.Cal. 1995) (applying deliberate indifference standard to use of tasers against prisoners taking psychotropic medications because the policy itself requires deliberation before use).

[20] MacKay v. Farnsworth, 48 F.3d 491, 493 (10th Cir. 1995) (holding district court erred in applying malicious and sadistic standard to inmate assault case even though the assault presented a security threat).

[21] Hudson v. Palmer, 468 U.S. 517, 530 (1984); *see* Scher v. Engelke, 943 F.2d 921, 923-24 (8th Cir. 1991) (awarding punitive damages for repeated harassing cell searches done in retaliation for complaints about guard misconduct), *cert. denied*, 503 U.S. 952 (1992).

good law,[22] and presumably is applicable to other forms of harassing conduct besides searches. [23] Arguably it is equivalent to malicious and sadistic conduct.[24]

B. The objective element: "sufficiently serious"

The prisoner must show that challenged conditions are "sufficiently serious to violate the Eighth Amendment."[25] In medical care cases, the Eighth Amendment is violated by deliberate indifference to "serious medical needs."[26] In subsequent decisions the Supreme Court has held generally that deliberate indifference to "excessive risks to inmate health or safety" violate the Eighth Amendment.[27]

Recent Supreme Court decisions have focused on harm and the risk of harm, leading some courts to assume explicitly or implicitly that these are requirements of an Eighth

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[22] *See* Harper v. Showers, 174 F.3d 716, 720 (5th Cir. 1999) (holding allegation of frequent searches for no purpose but to harass was not frivolous).

[23] *But see* Johnson v. Dellatifa, 357 F.3d 539, 546 (6th Cir.) (holding allegations that an officer continuously banged and kicked his cell door, threw food trays through the slot so hard the top came off, made aggravating remarks, insulted him about his hair length, growled and snarled through the cell window and smeared the window so he couldn't see out, behaved in a racially prejudiced manner towards him, and jerked and pulled him unnecessarily hard when escorting him from his cell would, if true, "demonstrate shameful and utterly unprofessional behavior by [the officer], they are insufficient to establish an Eighth Amendment violation"), *cert. denied*, 125 S.Ct. 157 (2004). *Compare* Parrish v. Johnson, 800 F.2d 600, 604 (6th Cir. 1986) (holding that an officer's waving of a knife in a paraplegic prisoner's face, knife-point extortion of potato chips and cookies, incessant taunting, and failure to relay requests for medical care to the nurses violated the Eighth Amendment. The court emphasizes the plaintiff's paraplegic condition, his dependence on the officer who was abusing him, and the resulting "significant mental anguish.")

[24] *See* Whitman v. Nesic, 368 F.3d 931, 934 (7th Cir. 2004) (equating "calculated harassment" to searches "maliciously motivated, unrelated to institutional security, and hence 'totally without penological justification'") (citation omitted).

[25] Chandler v. Crosby, 379 F.3d 1278, 1289 (11th Cir. 2004).

[26] Estelle v. Gamble, 429 U.S. 97, 104 (1976).

[27] Farmer v. Brennan, 511 U.S. 825, 836 (1994) (addressing risk of inmate-inmate assault); *see* Helling v. McKinney, 509 U.S. 25, 33 (1993) (holding risks of future harm actionable in case involving environmental tobacco smoke).

Amendment claim.[28] However, these decisions have not excluded from Eighth Amendment scrutiny the "unquestioned and serious deprivations of basic human needs" or of the "minimal civilized measure of life's necessities" that prior decisions had declared as standards for acceptable conditions under the Eighth Amendment, independent of proof of physical or psychiatric harm.[29] Moreover, the Supreme Court's holding that "calculated harassment unrelated to prison needs" may violate the Eighth Amendment,[30] and several circuits' holdings that exposure to the deranged behavior of persons with mental illness may do so as well,[31] indicate that there is a level of sheer unpleasantness that will violate the Eighth Amendment independent of harm or injury.[32] However, the Eleventh Circuit has recently held that "severe discomfort" resulting from exposure to hot summer temperatures did not violate the Eighth Amendment, citing *Farmer*'s and *Helling*'s references to "serious harm" and "serious damage to . . . future health."[33] It is not clear whether *Chandler* intended to restrict the scope of the Eighth Amendment entirely to "harm" and "damage," or whether it did so only with respect to conditions that are objected to by reason of their physical discomfort.

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[28] *See* Palmer v. Johnson, 193 F.3d 346, 352 (5th Cir. 1999); Shakka v. Smith, 71 F.3d 162, 166 (4th Cir. 1995).

[29] Rhodes v. Chapman, 452 U.S. 337, 347 (1981); *accord*, Wilson v. Seiter, 501 U.S. 294, 304-05 (1991); Palmer v. Johnson, 193 F.3d at 352 (having asserted a requirement of "deliberate indifference to health or safety," court does not examine actual risk to health or safety of challenged conditions); Harper v. Showers, 174 F.3d 716, 720 (5th Cir. 1999) ("[S]leep undoubtedly counts as one of life's basic needs. Conditions designed to prevent sleep, then, might violate the Eighth Amendment." Risk of harm not discussed.); Perkins v. Kansas Dept. of Corrections, 165 F.3d 803, 810 (10th Cir. 1999) (holding infliction of psychological pain is actionable).

[30] Hudson v. Palmer, 468 U.S. 517, 530 (1984).

[31] Harper v. Showers, 174 F.3d 716, 717, 720 (5th Cir.1999) (noting plaintiff's allegation that conditions deprived him of "cleanliness, sleep, and peace of mind"); DeMallory v. Cullen, 855 F.2d 442, 444-45 (7th Cir. 1988); Nolley v. County of Erie, 776 F.Supp. 715, 738-40 (W.D.N.Y. 1991); Langley v. Coughlin, 715 F.Supp. 522, 540 (S.D.N.Y. 1989).

[32] *See* Scher v. Engelke, 943 F.2d 921, 924 (8th Cir. 1991) (holding "the scope of eighth amendment protection is broader than the mere infliction of physical pain . . ., and evidence of fear, mental anguish, and misery inflicted through frequent retaliatory cell searches, some of which resulted in the violent dishevelment of Scher's cell, could suffice as the requisite injury for an eighth amendment claim."), *cert. denied*, 502 U.S. 952 (1992); Mitchell v. Newryder, 245 F.Supp.2d 200, 204 (D.Me. 2003) (holding prisoner denied access to toilet stated a valid claim that he was "purposefully subjected to dehumanizing prison conditions" regardless of risk of harm).

[33] Chandler v. Crosby, 379 F.3d 1278, 1296-97 (11th Cir. 2004).

Basic human needs identified by the courts include "food, clothing, shelter, medical care and reasonable safety";[34] warmth;[35] exercise;[36] the "basic elements of hygiene";[37] and sleep.[38]

The length of time for which prisoners are subjected to even the worst conditions plays a significant part in the analysis of their constitutionality.[39]

Deprivations even of these necessities will be upheld if there is a sufficient penological justification for them. Thus, the Eleventh Circuit has held that depriving "Close Management" prisoners of the two hours' outdoor recreation they were permitted, based on acts of serious and dangerous misconduct, did not violate the Eighth Amendment, even if it inflicted pain, in light of its penological justification.[40] Similarly, the Second Circuit upheld the deprivation of all property except one pair of shorts and denial of recreation, showers, hot water and a cell bucket for about two weeks to a prisoner who persisted in misbehaving in a segregation unit. The court said the noted that the plaintiff's condition was regularly monitored by a nurse and that the purpose of the

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[34] Helling v. McKinney, 509 U.S. 25, 32 (1993), *citing* DeShaney v. Winnebago County Dept. of Social Services, 489 U.S. 189, 199-200 (1989).

[35] Wilson v. Seiter, 501 U.S. 294, 304 (1991); Palmer v. Johnson, 193 F.3d 346, 352-53 (5th Cir. 1999) (holding overnight exposure to winds and cold actionable under the Eighth Amendment).

[36] Wilson v. Seiter, 501 U.S. at 304; Perkins v. Kansas Dept. of Corrections, 165 F.3d 803, 810 (10th Cir. 1999) (holding allegation of protracted denial of outdoor exercise stated a claim).

[37] Palmer v. Johnson, 193 F.3d 346, 352 (5th Cir. 1999), *quoting* Novak v. Beto, 453 F.2d 661, 665 (5th Cir. 1971) (holding that deprivation of toilet facilities for inmates in a small area would violate the Eighth Amendment); Harper v. Showers, 174 F.3d 716, 717, 720 (5th Cir. 1999) (allegation of placement into filthy, sometimes feces-smeared cells formerly housing psychiatric patients raised a non-frivolous Eighth Amendment claim); Bradley v. Puckett, 157 F.3d 1022, 1025 (5th Cir. 1998) (holding that inability to bathe for two months resulting in a fungal infection requiring medical attention stated an Eighth Amendment claim). *But see* Davis v. Scott, 157 F.3d 1003, 1004-06 (5th Cir. 1998) (holding that confinement in cell with blood on floor and excrement on wall was not unconstitutional because it was only for three days and cleaning supplies were made available).

[38] Harper v. Showers, 174 F.3d 716, 720 (5th Cir. 1999).

[39] *See* Alexander v. Tippah County, 351 F.3d 626, 631 (5th Cir. 2003) (questioning whether "deplorable" sanitary conditions imposed for 24 hours violated the Eighth Amendment; citing cases), *cert. denied*, 124 U.S. 2071 (2004).

[40] Bass v. Perrin, 170 F.3d 1312, 1316-17 (11th Cir. 1999) (terming the deprivation "a rational, albeit debatable, response to the substantial threat posed by the plaintiffs").

measures was to control ongoing misconduct by the prisoner.[41] Whether such treatment would be upheld for significantly longer periods of time is questionable.[42]

C. Recurring issues in medical care cases

1. Deliberate indifference

In applying the deliberate indifference principle in medical care cases, an essential principle is that lapses and differences of medical judgment are not actionable.[43] However, that does not mean prison doctors' decisions are *per se* unassailable.[44] In all cases, the question is

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[41] Trammell v. Keane, 338 F.3d 155, 163, 165-66 (2d Cir. 2003).

[42] *See* Williams v. Greifinger, 97 F.3d 699, 704-05 (2d Cir. 1996) (holding that treatment "otherwise . . . impermissible under the Eighth Amendment" is not acceptable for behavior control purposes; affirming summary judgment for prisoner denied all out-of-cell exercise, all out-of-cell activity except a ten-minute shower each week, and all visits except from attorneys, for 589 days because he refused a TB test).

[43] *See* McElligott v. Foley, 182 F.3d 1248, 1256-57 (11th Cir. 1999) (holding failure to diagnose prisoner's cancer was not deliberate indifference, though failure to treat his worsening pain might be); Stewart v. Murphy, 174 F.3d 530, 535 (5th Cir.), *cert. denied*, 528 U.S. 906 (1999); Perkins v. Kansas Dept. of Corrections, 165 F.3d 803, 811 (10th Cir. 1999) (denial of protease inhibitor to prisoner with HIV upheld, since other treatment was provided); Estate of Cole by Pardue v. Fromm, 94 F.3d 254, 261 (7th Cir. 1996), *cert. denied*, 519 U.S. 1109 (1997); Starbeck v. Linn County Jail, 871 F.Supp. 1129, 1144-45 (N.D.Iowa 1994); *see* Shakka v. Smith, 71 F.3d 162, 166 (4th Cir. 1995) (removal of plaintiff's wheelchair, done by psychologist to protect him and others, was not actionable).

[44] *See* Farrow v. West, 320 F.3d 1235, 1247-48 (11th Cir. 2003) (holding unexplained long delay in providing dentures by a dentist familiar with prisoner's painful condition could constitute deliberate indifference); McElligott v. Foley, 182 F.3d 1248, 1256-57 (11th Cir. 1999) (holding failure to inquire further into, and treat, plaintiff's severe pain, and repeated delays in doctor's seeing the patient, could be deliberate indifference); Hunt v. Uphoff, 199 F.3d 1220, 1223-24 (10th Cir. 1999) (refusing to dismiss allegations that one doctor denied insulin prescribed by another doctor and that medically recommended procedures were not performed as mere differences of medical opinion); Miller v. Schoenen, 75 F.3d 1305 (8th Cir. 1996) (expert evidence combined with recommendations from outside hospitals that were not followed supported deliberate indifference claim); Hamilton v. Endell, 981 F.2d 1063, 1066-67 (9th Cir. 1992) (disregard of ear surgeon's direction not to transfer prisoner by airplane could constitute deliberate indifference even though officials obtained a second opinion from their own physician; "By choosing to rely upon a medical opinion which a reasonable person would likely determine to be inferior, the prison officials took actions which may have amounted to the denial of medical treatment, and the 'unnecessary and

whether legitimate medical judgment is actually at issue. There are a number of common scenarios that have been acknowledged to present issues of deliberate indifference and not differences of professional opinion:

- Denial of or delay in access to medical personnel[45] or in their providing treatment.[46] Delay is evaluated in light of the seriousness of the prisoner's medical need.[47]

- Denial of access to medical practitioners qualified to address the prisoner's problem.[48]

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wanton infliction of pain.'"); Pugliese v. Cuomo, 911 F.Supp. 58, 63 (N.D.N.Y. 1996) (plaintiff entered prison with a recommendation for physical therapy; one prison doctor said he would never waste the state's money on such treatment); Starbeck v. Linn County Jail, 871 F.Supp. 1129, 1146-47 (N.D.Iowa 1994) (where outside doctors had recommended hernia surgery, prison officials who failed to provide the surgery could not claim a difference in medical judgment without providing an explanation of their decision). *But see* Vaughan v. Lacey, 49 F.3d 1344, 1345-46 (8th Cir. 1995) (prison authorities could rely on their own physicians and not prisoner's civilian treating physician).

[45] Estelle v. Gamble, 429 U.S. 97, 104 (1976); *see* LeMarbe v. Wisneski, 266 F.3d 429, 440 (6th Cir. 2001) (failure to make timely referral to specialist or tell the patient to seek one out was deliberate indifference), *cert. denied*, 535 U.S. 1056 (2002); McElligott v. Foley, 182 F.3d 1248, 1256-57 (11th Cir. 1999) (holding repeated delays in doctor's seeing a patient with constant severe pain could constitute deliberate indifference); Murphy v. Walker, 51 F.3d 714, 719 (7th Cir. 1995) (two-month failure to get prisoner with head injury to a doctor stated a claim); H.C. by Hewett v. Jarrard, 786 F.2d 1080, 1083, 1087 (11th Cir. 1986) (isolation of injured inmate and deprivation of medical attention for three days). *But see* Peterson v. Willie, 81 F.3d 1033, 1038 (11th Cir. 1996) (holding delay in providing the plaintiff with medication did not constitute deliberate indifference because the medication is toxic and the defendants were waiting to get his prior medical records, and because getting the medication would not have immediately changed the plaintiff's symptoms).

[46] Farrow v. West, 320 F.3d 1235, 1247-48 (11th Cir. 2003) (holding delay of 15 months in providing dentures, with three- and eight-month hiatuses in treatment, by a dentist familiar with prisoner's painful condition, raised a jury question of deliberate indifference).

[47] *See* Lancaster v. Monroe County, Ala., 116 F.3d 1419, 1425 (11th Cir. 1997) (holding that "a jail official who is aware of but ignores the dangers of acute alcohol withdrawal and waits for a manifest emergency before obtaining medical care is deliberately indifferent. . . ."); Weyant v. Okst, 101 F.3d 845, 856-57 (2d Cir. 1996) (delay of hours in getting medical attention for a diabetic in insulin shock raised a question of deliberate indifference); *see also* n. 63, below.

[48] LeMarbe v. Wisneski, 266 F.3d 429, 440 (6th Cir. 2001) (failure to make timely referral to specialist or tell the patient to seek one out was deliberate indifference), *cert. denied*, 535 U.S. 1056 (2002); Howell v. Evans, 922 F.2d 712, 723 (11th Cir. 1991) (failure to provide access to a respiratory therapist could constitute deliberate indifference), *vacated as settled*, 931 F.2d 711 (11th

- Failure to inquire into facts necessary to make a professional judgment.[49]

- Interference with medical judgment by non-medical factors.[50]

Cir. 1991); Mandel v. Doe, 888 F.2d 783, 789-90 (11th Cir. 1989) (damages awarded where physician's assistant failed to diagnose a broken hip, refused to order an x-ray, and prevented the prisoner from seeing a doctor); Waldrop v. Evans, 871 F.2d 1030, 1036 (11th Cir.) (non-psychiatrist was not competent to evaluate the significance of a prisoner's suicidal gesture; prison officials must "inform competent authorities" of medical or psychiatric needs) (emphasis supplied), *rehearing denied*, 880 F.2d 421 (11th Cir. 1989); Washington v. Dugger, 860 F.2d 1018, 1021 (11th Cir. 1988) (failure to return patient to VA hospital for treatment for Agent Orange exposure); Toussaint v. McCarthy, 801 F.2d 1080, 1112 (9th Cir. 1986) (rendering of medical services by unqualified personnel is deliberate indifference), *cert. denied*, 481 U.S. 1069 (1987); Ancata v. Prison Health Services, Inc., 769 F.2d 700, 704-05 (11th Cir. 1985) (refusal to provide specialty consultations without a court order).

[49] McElligott v. Foley, 182 F.3d 1248, 1256-57 (11th Cir. 1999) (holding failure to inquire into, and treat, plaintiff's severe pain, and repeated delays in doctor's seeing the patient, could be deliberate indifference); Steele v. Shah, 87 F.3d 1266, 1270 (11th Cir. 1996) (denying summary judgment to prison doctor who had been told the plaintiff received psychiatric medication in part because of suicide risk, but discontinued it based on a cursory interview without reviewing medical records); Liscio v. Warren, 901 F.2d 274, 276-77 (2d Cir. 1990) (physician failed to inquire into the cause of an arrestee's delirium and thus failed to diagnose alcohol withdrawal); Miltier v. Beorn, 896 F.2d 848, 853 (4th Cir. 1990) (doctor failed to perform tests for cardiac disease in patient with symptoms that called for them); Tillery v. Owens, 719 F.Supp. 1256, 1308 (W.D.Pa. 1989) ("We will defer to the informed judgment of prison officials as to an appropriate form of medical treatment. But if an informed judgment has not been made, the court may find that an eighth amendment claim has been stated."), *aff'd*, 907 F.2d 418 (3d Cir. 1990).

[50] Anderson v. County of Kern, 45 F.3d 1310 (9th Cir. 1995) (failure to provide a translator for medical encounters can constitute deliberate indifference); Cabrales v. County of Los Angeles, 864 F.2d 1454, 1461 (9th Cir. 1988) (understaffing such that psychiatric staff could only spend "minutes per month" with disturbed inmates was unconstitutional), *vacated*, 494 U.S. 1091 (1989), *reinstated*, 886 F.2d 235 (9th Cir. 1989), *cert. denied*, 494 U.S. 1091 (1990); Monmouth County Correctional Institution Inmates v. Lanzaro, 834 F.2d 326, 347 (3d Cir. 1987) (restrictions on abortion unrelated to individual treatment needs), *cert. denied*, 486 U.S. 1066 (1988); Jones v. Johnson, 781 F.2d 769, 771 (9th Cir. 1986) (budgetary restrictions); Ancata v. Prison Health Services, Inc., 769 F.2d 700, 704-05 (11th Cir. 1985) (refusal to provide specialty consultations without a court order); Madrid v. Gomez, 889 F.Supp. 1146, 1221 (N.D.Cal. 1995) (lack of input by mental health staff concerning housing decisions even where they impact mental health supported deliberate indifference finding); Starbeck v. Linn County Jail, 871 F.Supp. 1129, 1145-46 (N.D.Iowa 1994) (evidence that hernia surgery recommended by outside doctors was not performed because the

- Failure to carry out medical orders.[51]

- Judgment so bad that it isn't really medical, as when "deliberate indifference cause[s] an easier and less efficacious treatment to be consciously chosen by the doctors."[52] Courts have formulated this idea in various ways, *e.g.*: "Medical treatment that is 'so grossly incompetent, inadequate, or excessive as to shock the conscience or to be intolerable to fundamental fairness' constitutes deliberate indifference. . . . Additionally, when the need for medical treatment is obvious, medical care that is so cursory as to amount to no treatment at all may constitute deliberate indifference. . . ." [53]

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county didn't want to pay for it could establish deliberate indiference).

[51] Estelle v. Gamble, 429 U.S. at 105 ("intentionally interfering with the treatment once prescribed"); *see* Lawson v. Dallas County, 286 F.3d 257, 263 (5th Cir. 2002) (disregard for follow-up care instructions for paraplegic); Ralston v. McGovern, 167 F.3d 1160, 1161-62 (7th Cir. 1999) (refusal to provide prescribed medication); Koehl v. Dalsheim, 85 F.3d 86, 88 (2d Cir. 1996) (denial of prescription eyeglasses sufficiently alleged deliberate indifference); Erickson v. Holloway, 77 F.3d 1078, 1081 (8th Cir. 1996) (officer's refusal of emergency room doctor's request to admit the prisoner and take x-rays supports deliberate indifference claim); Boretti v. Wiscomb, 930 F.2d 1150, 1156 (6th Cir. 1991) (nurse's failure to perform prescribed dressing change); Howell v. Evans, 922 F.2d 712, 723 (11th Cir. 1991) (failure to act on a medical judment that prisoners needed access to a respiratory therapist), *vacated as settled*, 931 F.2d 711 (11th Cir. 1991); McCorkle v. Walker, 871 F.Supp. 555, 558 (N.D.N.Y. 1995) (failure to obey a medical order to house asthmatic prisoner on a lower tier stated a claim). *But see* Williams v. O'Leary, 55 F.3d 320 (7th Cir.) (two-year failure to provide correct osteomyelitis medication, resulting inter alia from failure to read medical records, was merely negligent), *cert. denied*, 516 U.S. 993 (1995).

[52] Williams v. Vincent, 508 F.2d 541, 544 (2d Cir. 1974); *see* McElligott v. Foley, 182 F.3d 1248, 1256-57 (11th Cir. 1999) (holding failure to inquire further into, and treat, plaintiff's severe pain, and repeated delays in doctor's seeing the patient, could support a finding of taking an "easier but less efficacious course of treatment"); *see also* Farrow v. West, 320 F.3d 1235, 1247-48 (11th Cir. 2003) (holding delay of 15 months in providing dentures, with three- and eight-month hiatuses in treatment, by a dentist familiar with prisoner's painful condition, raised a jury question of deliberate indifference).

[53] Adams v. Poag, 61 F.3d 1537, 1543-44 (11th Cir. 1995); *see also* Collignon v. Milwaukee County, 163 F.3d 982, 989 (7th Cir. 1998) ("A plaintiff can show that the professional disregarded the need only if the professional's subjective response was so inadequate that it demonstrated an absence of professional judgment, that is, that no minimally competent professional would have so responded under those circumstances."); Hughes v. Joliet Correctional Center, 931 F.2d 425, 428 (7th Cir. 1991) (evidence that medical staff treated the plaintiff "not as a patient, but as a nuisance," and "were insufficiently interested in his health to take even minimal steps to guards against the

2. Deliberate indifference and negligence

Courts have held that "repeated examples of negligent acts which disclose a pattern of conduct by the prison medical staff" may add up to deliberate indifference.[54] More recently, courts have cautioned: "It may be, as quite a large number of cases state . . . that repeated acts of negligence are some evidence of deliberate indifference. . . . The only significance of multiple acts of negligence is that they may be evidence of the magnitude of the risk created by the defendants' conduct and the knowledge of the risk by the defendants. . . ."[55] A finding of medical malpractice does not preclude a finding of deliberate indifference.[56]

3. Serious medical needs

The most common definition of "serious medical need" is "one that has been diagnosed by a physician as mandating treatment or one that is so obvious that even a lay person would easily recognize the necessity of a doctor's attention."[57] Some courts have suggested that "only 'extreme pain' or a degenerative condition would suffice to meet the legal standard," but that is wrong, because "'the Eighth Amendment forbids not only deprivations of medical care that produce physical torture and lingering death, but also less serious denials which cause or perpetuate pain.'"[58] Recent medical care decisions have given great emphasis in assessing

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possibility that the injury was severe" could support a finding of deliberate indifference); Howell v. Evans, 922 F.2d 712, 719 (11th Cir. 1991) ("the contemporary standards and opinions of the medical profession are highly relevant in determining what constitutes deliberate indifference"), *vacated as settled*, 931 F.2d 711 (11th Cir. 1991); Smith v. Jenkins, 919 F.2d 90, 93 (8th Cir. 1990) (plaintiff should be permitted to prove that treatment "so deviated from professional standards that it amounted to deliberate indifference"); Rogers v. Evans, 792 F.2d 1052, 1058 (11th Cir. 1986).

[54] Ramos v. Lamm, 639 F.2d 559, 575 (10th Cir. 1980), *cert. denied*, 450 U.S. 1041 (1981); *accord*, Harris v. Thigpen, 941 F.2d 1495, 1505 (11th Cir. 1991); DeGidio v. Pung, 920 F.2d 525, 533 (8th Cir. 1990) ("consistent pattern of reckless or negligent conduct" establishes deliberate indifference).

[55] Sellers v. Henman, 41 F.3d 1100, 1102-03 (7th Cir. 1994); *accord*, Brooks v. Celeste, 39 F.3d 125, 128-29 (6th Cir. 1994).

[56] Hathaway v. Coughlin, 99 F.3d 550 (2d Cir. 1996).

[57] Brown v. Johnson, 387 F.3d 1344, 1351 (11th Cir. 2004) (holding HIV and hepatitis were serious needs); Hill v. DeKalb Regional Youth Detention Center, 40 F.3d 1176, 1187 (11th Cir. 1994).

[58] Brock v. Wright, 315 F.3d 158, 162 (2d Cir. 2003). The Eleventh Circuit has said that "the medical need must be one that, if left unattended, pos[es] a substantial risk of serious harm." Brown

medical needs to pain[59] and disability.[60] A recent decision holds that the seriousness of a medical need is determined by factors including but not limited to "(1) whether a reasonable doctor or patient would perceive the medical need in question as 'important and worthy of comment or treatment,' (2) whether the medical condition significantly affects daily activities, and (3) 'the existence of chronic and substantial pain.'"[61] There may also be a "serious cumulative effect from the repeated denial of care with regard to even minor needs."[62]

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v. Johnson, *id.* (citation and internal quotation marks omitted). Presumably serious or chronic pain is "serious harm."

[59] *See* Estelle v. Gamble, 429 U.S. 97, 104 (1976). Numerous courts have cited pain in finding medical needs serious. Farrow v. West, 320 F.3d 1235, 1244-45 (11th Cir. 2003) (holding that pain, bleeding and swollen gums, and teeth slicing into gums of prisoner who needed dentures helped show serious medical need; "life-long handicap or permanent loss" not required on these facts); Cooper v. Casey, 97 F.3d 914, 916-17 (7th Cir. 1996) (subjective complaints of pain from beating verified by doctor's prescription of pain medication 48 hours later); McGuckin v. Smith, 974 F.2d 1050, 1060 (9th Cir. 1992) ("chronic and substantial pain"); Boretti v. Wiscomb, 930 F.2d 1150, 1154-55 (6th Cir. 1991) (needless pain even without permanent injury); Moreland v. Wharton, 899 F.2d 1168, 1170 (11th Cir. 1989) ("significant and uncomfortable health problem"); Johnson-El v. Schoemehl, 878 F.2d 1043, 1055 (8th Cir. 1989) (condition that is "medically serious or painful in nature"); Washington v. Dugger, 860 F.2d 1018, 1021 (11th Cir. 1988) (denial of treatments that "eliminated pain and suffering at least temporarily"); Dean v. Coughlin, 623 F.Supp. 392, 404 (S.D.N.Y. 1985) ("conditions that cause pain, discomfort, or threat to good health"); *see* McElligott v. Foley, 182 F.3d 1248, 1256-57 (11th Cir. 1999) (holding failure to treat severe pain could constitute deliberate indifference).

[60] Koehl v. Dalsheim, 85 F.3d 86, 88 (2d Cir. 1996) (loss of vision may not be "pain" but it is "suffering"); McGuckin v. Smith, 974 F.2d at 1050, 1060 (9th Cir. 1992) (condition that "significantly affects an individual's daily activities" is actionable); Johnson v. Bowers, 884 F.2d 1053, 1056 (8th Cir. 1989) (prison must treat a "substantial disability"); Monmouth County Correctional Institution Inmates v. Lanzaro, 834 F.2d 326, 347 (3d Cir. 1987) (medical need is serious if it imposes a "life-long handicap or permanent loss"), *cert. denied*, 486 U.S. 1066 (1988); Pugliese v. Cuomo, 911 F.Supp. 58 (N.D.N.Y. 1996) (denial of physical therapy for pre-existing injury held serious); Tillery v. Owens, 719 F.Supp. 1256, 1286 (W.D.Pa. 1989) (citing definition of "serious" mental illness as one "that has caused significant disruption in an inmate's everyday life and which prevents his functioning in the general population without disturbing or endangering others or himself"), *aff'd*, 907 F.2d 418 (3d Cir. 1990); Young v. Harris, 509 F.Supp. 1111, 1113-14 (S.D.N.Y. 1981) (failure to provide leg brace was actionable).

[61] Brock v. Wright, 315 F.3d 158, 162 (2d Cir. 2003); *see also* Carnell v. Grimm, 872 F.Supp. 746, 755 (D.Haw. 1994), *appeal dismissed in part, aff'd in part,* 74 F.3d 977 (9th Cir. 1996).

[62] Jones v. Evans, 549 F.Supp. 769, 775 n. 4 (N.D.Ga. 1982).

In cases of temporary delay or interruption of treatment, the proper question may be whether the delay or interruption–not the underlying medical condition–is objectively serious enough to present an Eighth Amendment question.[63]

Prison officials' "serious need list" is not dispositive,[64] nor are non-legal catchphrases like "elective."[65]

4. Mental health care

Mental health care is governed by the same deliberate indifference/serious needs analysis as physical health care.[66] Serious mental illness has been defined by one court as one "that has caused significant disruption in an inmate's everyday life and which prevents his functioning in the general population without disturbing or endangering others or himself."[67] Immediate

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[63] Smith v. Carpenter, 316 F.3d 178, 186-89 (2d Cir. 2003) (holding brief interruptions of HIV medications, with no discernible adverse effects, did not present serious medical needs; noting that a showing of increased risk, even absent presently detectable symptoms, might be serious enough); Hill v. DeKalb Regional Youth Detention Center, 40 F.3d 1176, 1188 (11th Cir. 1994) (holding four-hour delay in getting prisoner with blood in his underwear to a hospital was not deliberate indifference); Beyerbach v. Sears, 49 F.3d 1324, 1326 (8th Cir. 1995) (broken hand can be serious, but delay of two or three hours in treating it was not).

[64] Martin v. DeBruyn, 880 F.Supp. 610, 614 (N.D.Ind. 1995).

[65] Johnson v. Bowers, 884 F.2d at 1053, 1056 (8th Cir. 1989); Monmouth County Correctional Institution Inmates v. Lanzaro, 834 F.2d 326, 349 (3d Cir. 1987), *cert. denied*, 486 U.S. 1066 (1988).

[66] Langley v. Coughlin, 888 F.2d 252, 254 (2d Cir. 1989); *accord*, Gates v. Cook, 376 F.3d 323, 343 (5th Cir. 2004); Dolihite v. Maughon by and through Videon, 74 F.3d 1027, 1042-43 (11th Cir.) (holding a prison staff member who knew of the decedent's extensive history of mental illness and suicidal behavior and talk could be held liable for taking him off close observation if she was shown to be aware of his recent self-injurious behavior), *cert. denied*, 519 U.S. 870 (1996). *But see* Campbell v. Sikes, 169 F.3d 1353, 1367-68 (11th Cir. 1999) (holding there was no deliberate indifference in terminating patient's medication and restraining her absent evidence that the defendant psychiatrist knew the nature of her illness); Harris v. Thigpen, 941 F.2d 1495, 1510-11 (11th Cir. 1991) (holding that if professional judgment is exercised and some treatment is provided, courts will generally not find deliberate indifference).

[67] Tillery v. Owens, 719 F.Supp. 1256, 1286 (W.D.Pa. 1989), *aff'd*, 907 F.2d 418 (3d Cir. 1990).

psychological trauma may also constitute a serious need.[68] Transsexualism or gender identity disorder (GID) is generally recognized as a serious medical need at least in some cases,[69] though courts have differed over the extent of prison officials' obligations in such cases.[70]

Among the deficiencies in prison mental health care that courts have held actionable are the lack of mental health screening on intake,[71] the failure to follow up inmates with known or suspected mental disorders,[72] the failure to hospitalize inmates whose conditions cannot adequately be treated in prison,[73] gross departures from professional standards in treatment,[74] and

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[68] Carnell v. Grimm, 872 F.Supp. 746, 756 (D.Haw. 1994) (holding that "an officer who has reason to believe someone has been raped and then fails to seek medical *and psychological* treatment after taking her into custody manifests deliberate indifference to a serious medical need"), *appeal dismissed in part, aff'd in part,* 74 F.3d 977 (9th Cir. 1996) (emphasis supplied).

[69] Cuoco v. Moritsugu, 222 F.3d 99, 106 (2d Cir. 2000) and cases cited.

[70] *See* De'Lonta v. Angelone, 330 F.3d 630, 635 (4th Cir. 2003) (holding prisoner with GID was entitled to treatment for compulsion to self-mutilate); Maggert v. Hanks, 131 F.3d 670, 671-72 (7th Cir. 1997) (stating in dictum that prison officials need not provide hormonal and surgical procedures to "cure" GID); Brooks v. Berg, 270 F.Supp.2d 302, 310 (N.D.N.Y.) (holding persons with GID entitled to some form of treatment determined by medical professionals and not by prison administrators; holding a policy to treat transsexualism only for those diagnosed before incarceration "contrary to a decided body of law"), *vacated in part on other grounds*, 289 F.Supp.2d 286 (N.D.N.Y. 2003); Kosilek v. Maloney, 221 F.Supp.2d 156 (D.Mass. 2002) (holding an individualized determination by medical professionals is required; a blanket policy denying initiation of hormone therapy in prison is impermissible); Wolfe v. Horn, 130 F.Supp.2d 648, 652-53 (E.D.Pa. 2001) (holding that refusal to continue hormone treatment commenced before incarceration may constitute deliberate indifference).

[71] Inmates of Occoquan v. Barry, 717 F.Supp. 854, 868 (D.D.C. 1989); Balla v. Idaho State Bd. of Correction, 595 F.Supp. at 1577; Ruiz v. Estelle, 503 F.Supp. at 1339; Inmates of Allegheny County Jail v. Pierce, 487 F.Supp. 638, 642, 644 (W.D.Pa. 1980); Pugh v. Locke, 406 F.Supp. 318, 324 (M.D.Ala. 1976), *aff'd in part and modified sub nom.* Newman v. Alabama, 559 F.2d 283 (5th Cir. 1977), *cert. denied*, 438 U.S. 915 (1978).

[72] Terry v. Hill, 232 F.Supp.2d 934, 943-44 (E.D.Ark. 2002) (holding lengthy delays in transferring mentally ill detainees to mental hospital were unconstitutional); Arnold on behalf of H.B. v. Lewis, 803 F.Supp. 246, 257 (D.Ariz. 1992).

[73] Arnold on behalf of H.B. v. Lewis, 803 F.Supp. at 257.

[74] Smith v. Jenkins, 919 F.2d 90, 93 (8th Cir. 1990) (care that "so deviated from professional standards that it amounted to deliberate indifference" would violate the Constitution); Waldrop v. Evans, 871 F.2d at 1033 ("grossly incompetent or inadequate care" can constitute deliberate

the failure to separate severely mentally ill inmates from the mentally healthy.[75] (Mixing mentally ill inmates with those who are not mentally ill may violate the rights of both groups.)[76] Courts have also held that housing mentally ill prisoners under conditions of extreme isolation is unconstitutional.[77] One recurring scenario is the seemingly baseless discontinuation of

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indifference; the prisoner's medication was discontinued abruptly and without justification); Greason v. Kemp, 891 F.2d 829, 835 (11th Cir. 1990) (similar to *Waldrop*; "grossly inadequate psychiatric care" can be deliberate indifference); Langley v. Coughlin, 715 F.Supp. 522, 537-41 (S.D.N.Y. 1988) ("consistent and repeated failures . . . over an extended period of time" could establish deliberate indifference).

[75] Cortes-Quinones v. Jiminez-Nettleship, 842 F.2d 556, 560-61 (1st Cir. 1988) (transferring a mentally ill inmate to general population in a crowded jail with no psychiatric facilities constituted deliberate indifference), *cert. denied*, 488 U.S. 823 (1988); Tillery v. Owens, 719 F.Supp. 1256, 1303-04 (W.D.Pa. 1989) (Constitution requires separate unit for severely mentally ill, i.e., those who will not take their medication regularly, maintain normal hygienic practices, accept dietary restrictions, or report symptoms of illness), *aff'd*, 907 F.2d 418 (3d Cir. 1990); Inmates of Occoquan v. Barry, 717 F.Supp. 854, 868 (D.D.C. 1989) (inmates with mental health problems must be placed in a separate area or a hospital and not in administrative/punitive segregation area); Langley v. Coughlin, 709 F.Supp. 482, 484-85 (S.D.N.Y.) (placement of mentally ill in punitive segregation resulted in conditions that might violate the Eighth Amendment), *appeal dismissed*, 888 F.2d 252 (2d Cir. 1989); Langley v. Coughlin, 715 F.Supp. at 543-44 (same); Finney v. Mabry, 534 F.Supp. 1026, 1036-37 (E.D.Ark. 1982) (separate facility for "most severely mentally disturbed" required); Inmates of Allegheny County Jail v. Pierce, 487 F.Supp. at 644; *see also* Morales Feliciano v. Hernandez Colon, 697 F.Supp. 37, 48 (D.P.R. 1988) (mentally ill inmates barred from a jail). *Contra*, Delgado v. Cady, 576 F.Supp. 1446, 1456 (E.D.Wis. 1983) (housing of psychotics in segregation unit upheld).

[76] DeMallory v. Cullen, 855 F.2d 442, 444-45 (7th Cir. 1988) (allegation that mentally ill inmates were knowingly housed with non-mentally ill in a high-security unit and that they caused filthy and dangerous conditions stated an Eighth Amendment claim against prison officials); Nolley v. County of Erie, 776 F.Supp. 715, 738-40 (W.D.N.Y. 1991); Tillery v. Owens, 719 F.Supp. at 1303 (citing increased tension for psychologically normal inmates and danger of retaliation against mentally ill); Langley v. Coughlin, 709 F.Supp. at 484-85; Langley v. Coughlin, 715 F.Supp. at 543-44; see Hassine v. Jeffes, 846 F.2d 169, 178 n. 5 (3d Cir. 1988) (prisoners could seek relief from the consequences of other inmates' failure to receive adequate mental health services).

[77] Jones'El v. Berge, 164 F.Supp.2d 1096, 1116-25 (W.D.Wis. 2001) (granting preliminary injunction requiring removal of seriously mentally ill from "supermax" prison); Madrid v. Gomez, Madrid v. Gomez, 889 F.Supp. 1146, 1265 (N.D.Cal. 1995) (holding retention of mentally ill prisoners in Pelican Bay isolation unit unconstitutional).

psychiatric medications, sometimes with disastrous results.[78]

Many prison mental health care cases focus on the lack of adequate and qualified staff.[79] Several courts have concluded that the lack of an on-site psychiatrist in a large prison is unconstitutional.[80] The failure to train correctional staff to deal with mentally ill prisoners can also constitute deliberate indifference.[81]

Prisoners have a limited substantive right to refuse psychotropic medication and a

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[78] *See* Greason v. Kemp, 891 F.2d 829 (11th Cir. 1990) (prisoner killed himself); Waldrop v. Evans, 871 F.2d 1030 (11th Cir. 1989) (prisoner blinded and castrated himself). *But see* Campbell v. Sikes, 169 F.3d 1353, 1367-68 (11th Cir. 1999) (holding discontinuation of medication by doctor who did not know the prisoner's diagnosis, having not obtained her medical records but having read a summary, was not deliberately indifferent). *Cf.* Wakefield v. Thompson, 177 F.3d 1160, 1164 (9th Cir. 1999) (holding Eighth Amendment requires prison officials to provide mentally ill prisoners with a supply of medication upon release).

[79] Greason v. Kemp, 891 F.2d at 837-40 (prison clinic director, prison system mental health director, and prison warden could be found deliberately indifferent based on their knowing toleration of a "clearly inadequate" mental health staff); Waldrop v. Evans, 871 F.2d at 1036 (physician's failure to refer a suicidal prisoner to a psychiatrist could constitute deliberate indifference); Cabrales v. County of Los Angeles, 864 F.2d 1454, 1461 (9th Cir. 1988) (deliberate indifference was established where mental health staff could only spend "minutes per month" with disturbed inmates), *vacated*, 490 U.S. 1087 (1989), *reinstated*, 886 F.2d 235 (9th Cir. 1989), *cert. denied*, 494 U.S. 1091 (1990); Tillery v. Owens, 719 F.Supp. at 1302-03 ("gross staffing deficiencies" and lack of mental health training of nurses supported finding of deliberate indifference); Inmates of Occoquan v. Barry, 717 F.Supp. at 868 ("woefully short" mental health staff supported a finding of unconstitutionality); Langley v. Coughlin, 715 F.Supp. at 540 (use of untrained or unqualified personnel with inadequate supervision by psychiatrist supported constitutional claims); Inmates of Allegheny County Jail v. Pierce, 487 F.Supp. at 640-45; Ruiz v. Estelle, 503 F.Supp. 1265, 1339 (S.D.Tex. 1980), *aff'd in part and rev'd in part on other grounds*, 679 F.2d 1115 (5th Cir. 1982), *cert. denied*, 460 U.S. 1042 (1983).

[80] Langley v. Coughlin, 709 F.Supp. at 483-85; Kendrick v. Bland, 541 F.Supp. 21, 25-26 (W.D.Ky. 1981); *see also* Sharpe v. City of Lewisburg, Tenn., 677 F.Supp. 1362, 1367-68 (M.D.Tenn. 1988) (failure to train police to deal with mentally disturbed individual supported damage award).

[81] Langley v. Coughlin, 709 F.Supp. at 483-85; Kendrick v. Bland, 541 F.Supp. 21, 25-26 (W.D.Ky. 1981); *see also* Sharpe v. City of Lewisburg, Tenn., 677 F.Supp. 1362, 1367-68 (M.D.Tenn. 1988) (holding that failure to train police to deal with mentally disturbed individuals supported a damage award).

procedural right to notice and a hearing before they are involuntarily medicated.[82] They are entitled by due process to notice and a hearing before involuntary commitment to a psychiatric hospital.[83] State law may provide greater rights than the federal Constitution.

Sex offenders may be required to participate in programs of treatment for their disorders, even if part of the program requires them to admit guilt of offenses for which they have not been prosecuted and does not grant them immunity, as long as the consequences of non-participation are not so serious as to "compel" self-incrimination.[84] Apparently that is a rather high threshold.[85] Persons not actually convicted of sex offenses may nonetheless be found to be sex offenders based on other evidence.[86]

5. Dental care

Dental care is also governed by the deliberate indifference/serious needs analysis.[87]

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[82] Washington v. Harper, 494 U.S. 210 (1990). Government may also medicate criminal defendants to render them competent to stand trial, but only for serious charges and on a showing that the treatment will be medically appropriate, is unlikely to have side effects undermining a fair trial, and necessary "significantly to further important governmental trial-related interests." Sell v. U.S., 123 S.Ct. 2174, 2184 (2003).

[83] Vitek v. Jones, 445 U.S. 480 (1980).

[84] McKune v. Lile, 536 U.S. 24, 35-36 (2002).

[85] *McKune*, 536 U.S. at 36 ("The consequences in question here–a transfer to another prison where television sets are not placed in each inmate's cell, where exercise facilities are not readily available, and where work and wage opportunities are more limited–are not ones that compel a prisoner to speak about his past crimes despite a desire to remain silent.") The *McKune* plurality equated the threshold with the *Sandin v. Conner* "atypical and significant" test, *id.* at 37, but Justice O'Connor rejected that test while agreeing that the particular deprivations were not sufficiently serious to constitute compulsion. *Id.* at 52. *See* Wirsching v. Colorado, 360 F.3d 1191, 1203-04 (10th Cir. 2004) (holding total denial of visiting with his children and denial of opportunity to earn good time at the usual rate was not coercion); Gwinn v. Awmiller, 354 F.3d 1211, 1225-26 (9th Cir.) (holding that withholding of good time is not sufficient to constitute compulsion), *cert. denied*, 125 S.Ct. 181 (2004).

[86] Gwinn v. Awmiller, 354 F.3d at1219-20 (upholding classification based on a statement in the plaintiff's pre-sentence report by the victim; holding that the "process due" is the same as for prison disciplinary proceedings).

[87] Farrow v. West, 320 F.3d 1235, 1244-47 (11th Cir. 2003) (holding prisoner with only two lower teeth who suffered pain, continual bleeding and swollen gums, remaining teeth damaging gums, and weight loss had a serious medical need, and delay of 15 months and hiatuses of eight and

Limiting care to pulling teeth that could be saved is unconstitutional.[88]

D. Recurring issues in use of force cases

1. Intent requirement

As noted above, convicted prisoners must show that force was used against them with malicious and sadistic intent.[89] Some courts have held that the same standard governs pre-trial detainees' use of force claims, even though these are asserted under the Due Process Clause.[90] (One circuit has held that detainees' use of force claims are governed by the Fourth Amendment standard of objective reasonableness applied to uses of force during arrest.[91]) Cases holding that "spontaneous, isolated" or "unprovoked" attacks are not "punishment" are no longer good law.[92] Malice is seldom shown by direct evidence but may be inferred from circumstances and officers' actions.[93] The Eleventh Circuit has held that the defense of qualified immunity is not available in

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three months by dentist with knowledge of his condition raised a factual issue concerning deliberate indifference); Harrison v. Barkley, 219 F.3d 132, 137-39 (2d Cir. 2000) (holding refusal to fill a cavity violated the Eighth Amendment).

[88] Dean v. Coughlin, 623 F.Supp. 392, 405 (S.D.N.Y. 1985); *see* Chance v. Armstrong, 43 F.3d 698, 703-04 (2d Cir. 1998) (allegation that dentists proposed extraction rather than saving teeth for financial reasons stated an Eighth Amendment claim).

[89] *See* § I.A.2, above.

The Second Circuit has said that "*Hudson [v. McMillian]* does not limit liability to that subset of cases where 'malice' is present. Rather, *Hudson* simply makes clear that excessive force is defined as force not applied in a 'good-faith effort to maintain or restore discipline.' . . . Because decisions to use force are often made under great pressure and involve competing interests, the good-faith standard is appropriate. . . . The Court's use of the terms 'maliciously and sadistically' is, therefore, only a characterization of all 'bad faith' uses of force and not a limit on liability for uses of force that are otherwise in bad faith." Blyden v. Mancusi, 186 F.3d 252, 263 (2d Cir. 1999). I have no idea what this means, and the court has not elaborated.

[90] *See* U.S. v. Walsh, 194 F.3d 37, 47-48 (2d Cir. 1999); Valencia v. Wiggins, 981 F.2d 1440, 1446 (5th Cir.), *cert. denied*, 509 U.S. 905 (1993).

[91] Lolli v. County of Orange, 351 F.3d 410, 415 (9th Cir. 2003).

[92] U.S. v. Walsh, 194 F.3d at 48 (dictum); Pelfrey v. Chambers, 43 F.3d 1034, 1036-37 (6th Cir.), *cert. denied*, 515 U.S. 1116 (1995).

[93] Skrtich v. Thornton, 280 F.3d 1295, 1301-02 (11th Cir. 2002) (holding that courts should consider the need for force, the relation between the need and the force used, the threat reasonably perceived, and efforts to temper the severity of response), *citing* Hudson v. McMillian, 503 U.S. 1,

cases litigated under the malicious and sadistic standard.[94]

Arrestees' use of force claims are governed by the Fourth Amendment, and the question is "whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation."[95] The Eleventh Circuit has held that such claims require a showing of more than *de minimis* force, at least in cases where there was probable cause for the arrest.[96] Courts have differed over when a person ceases to be an arrestee and starts to be a detainee, with some drawing the line at the judicial probable cause determination[97] and others applying the due process standard at earlier points.[98]

7-8 (1992); Sims v. Artuz, 230 F.3d 14, 22 (2d Cir. 2000) (holding Eighth Amendment claim requires facts "from which it could be inferred that prison officials subjected [plaintiff] to excessive force"); Valencia v. Wiggins, 981 F.2d 1440, 1446 (5th Cir.), *cert. denied*, 509 U.S. 905 (1993); Miller v. Leathers, 913 F.2d 1085, 1088 (4th Cir. 1990) (en banc) (circumstances suggesting retaliatory intent by officer could support malice finding), *cert. denied*, 498 U.S. 1109 (1991); Oliver v. Collins, 914 F.2d 56, 59 (5th Cir. 1990) (testimony that a beating was completely gratuitous and that no force at all was necessary would support a finding of malice); Lewis v. Downs, 774 F.2d 711, 714 (6th Cir. 1985) (evidence that an officer kicked a handcuffed person who was lying on the ground showed malicious motivation).

[94] Skrtich v. Thornton, 280 F.3d at 1302.

[95] Graham v. Connor, 490 U.S. 386, 397 (1989). *But see* Williams v. Bramer, 180 F.3d 699, 704 (5th Cir.) (holding plaintiff must show "(1) an injury (2) which resulted directly and only from the use of force that was clearly excessive to the need and (3) the force used was objectively unreasonable"; choking during a search is not actionable, but choking motivated by malice is), *clarified*, 186 F.3d 633 (5th Cir. 1999).

[96] Nolin v. Isbell, 207 F.3d 1253, 1258 (11th Cir. 2000) (holding an allegation that an officer grabbed the plaintiff, threw him against a van several feet away, kneed him in the back and pushed his head into the side of the van, searched his groin in an uncomfortable manner, resulting in bruises to forehead, chest, and wrists, amounts only to *de minimis* force).

[97] *See* Pierce v. Multnomah County, Or., 76 F.3d 1032, 1042-43 (9th Cir. 1996), *cert. denied*, 519 U.S. 1006 (1996); Frohmader v. Wayne, 958 F.2d 1024, 1026-27 (10th Cir. 1992); Powell v. Gardner, 891 F.2d 1039, 1044 (2d Cir. 1989) (dictum) (applying Fourth Amendment to conduct occurring before probable cause determination).

[98] *See* United States v. Cobb, 905 F.2d 784, 788 (4th Cir. 1990) (assault in "booking room" treated as a due process case); Titran v. Ackman, 893 F.2d 145, 147 (7th Cir. 1990) (arrestee's presence in jail and completion of booking invoked due process standard); Wilkins v. May, 872 F.2d 190, 195 (7th Cir. 1989) (excessive force in questioning an arrestee is governed by due process), *cert. denied*, 493 U.S. 1026 (1990).

2. Amount of force and justification

Any amount of force more than *de minimis* is unconstitutional if done maliciously and sadistically,[99] including under some circumstances the proverbial push or shove.[100] Conversely, serious threats to security or safety may justify injurious or even deadly force.[101] But even when some force is justified, anything doesn't go.[102] Beating a prisoner who may have been disruptive or violent but who has already been subdued is the classic case of excessive force.[103] Physical abuse may not be used to extract information, either in criminal investigation or for jail security

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[99] Hudson v. McMillian, 503 U.S. 1, 9-10 (1992); *see* Pelfrey v. Chambers, 43 F.3d 1034, 1037 (6th Cir.) (allegation that officers forcibly cut off the plaintiff's hair with a knife stated an Eighth Amendment claim; actions seemed "designed to frighten and degrade"), *cert. denied*, 515 U.S. 1116 (1995); Felix v. McCarthy, 939 F.2d 699, 701-02 (9th Cir. 1991) (throwing a prisoner across a hallway into a wall without reason violated the Eighth Amendment), *cert. denied*, 502 U.S. 1093 (1992); Campbell v. Grammer, 889 F.2d 797, 802 (8th Cir. 1989) (completely unjustified spraying with fire hose violated Eighth Amendment); Jones v. Huff, 789 F.Supp. 526, 536 (N.D.N.Y. 1992) ("unwarranted and cavalier" kicks in the buttocks violated the Eighth Amendment.)

[100] H.C. by Hewett v. Jarrard, 786 F.2d 1080, 1085-86 (11th Cir. 1986) (a guard who pushed a juvenile inmate who was giggling and protesting the treatment of another inmate violated the Eighth Amendment); Arroyo Lopez v. Nuttall, 25 F.Supp.2d 407 (S.D.N.Y. 1998) (awarding damages against an officer who shoved a prisoner without justification while he was praying); Winder v. Leak, 790 F.Supp. 1403, 1407 (N.D.Ill. 1992) (pushing a disabled inmate and causing him to fall violated the Eighth Amendment).

[101] Whitley v. Albers, 475 U.S. 312, 322-26 (1986); Kinney v. Indiana Youth Center, 950 F.2d 462, 465-66 (7th Cir. 1991), *cert. denied*, 504 U.S. 959 (1992); Henry v. Perry, 866 F.2d 657, 659 (3d Cir. 1989); Brown v. Smith, 813 F.2d 1187, 1188-89 (11th Cir.) (officer was justified in pinning a handcuffed inmate's neck against a wall with a baton where he refused to go back into his cell), *rehearing denied*, 818 F.2d 871 (11th Cir. 1987).

[102] Miller v. Leathers, 913 F.2d 1085, 1089 (4th Cir. 1990) (en banc) (verbal provocations would not justify breaking a prisoner's arm with a baton), *cert. denied*, 498 U.S. 1109 (1991); United States v. Cobb, 905 F.2d 784 (4th Cir. 1990) (verbal provocation does not excuse a physical assault by a law enforcement officer); Corselli v. Coughlin, 842 F.2d 23, 26-27 (2d Cir. 1988) (jury could find for prisoner even if he had refused an order).

[103] Skrtich v. Thornton, 280 F.3d 1295, 1302 (11th Cir. 2002) ("It is not constitutionally permissible for officers to administer a beating as punishment for a prisoner's past misconduct."); Bogan v. Stroud, 958 F.2d 180, 185 (7th Cir. 1992); Miller v. Glanz, 948 F.2d 1562, 1564, 1567 (10th Cir. 1991); Williams v. Burton, 943 F.2d 1572, 1576 (11th Cir. 1991) (Constitution may be violated "if prison officials continue to use force after the necessity for the coercive action has ceased"); Ruble v. King, 911 F.Supp. 1544, 1557 (N.D.Ga. 1995).

purposes.[104]

Injury is "relevant to the Eighth Amendment inquiry but does not end it."[105] Minor injuries are actionable where force is gratuitous or clearly excessive.[106] Courts have held that force without injury is actionable in extreme circumstances such as credible threat of death or injury or other egregious conduct.[107] Courts may not grant summary judgment based on prison medical records that minimize injury to prisoners where there are sworn allegations or other evidence of more serious injury.[108]

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[104] Sims v. Artuz, 230 F.3d 14, 22 (2d Cir. 2000) (holding Eighth Amendment claim requires facts "from which it could be inferred that prison officials subjected [plaintiff] to excessive force"); Gray v. Spillman, 925 F.2d 90, 93 (4th Cir. 1991); Ware v. Reed, 709 F.2d 345, 351 (5th Cir. 1983); Cohen v. Coahoma County, Miss., 805 F.Supp. 398, 403-04 (N.D.Miss. 1992). *But see* Joos v. Ratliff, 97 F.3d 1125, 1126-27 (8th Cir. 1996) (affirming dismissal of claim for forcible fingerprinting of arrestee); Sanders v. Coman, 864 F.Supp. 496, 500 (E.D.N.C. 1994) (use of force to obtain blood samples does not violate the Eighth Amendment).

[105] Hudson v. McMillian, 503 U.S. 1, 7 (1992); Gomez v. Chandler, 163 F.3d 921, 924 and n. 4 (5th Cir. 1999) (noting that non-*de minimis* standard may require only "minor" injury, leaving open possibility that *de minimis* injury might be actionable if force is "repugnant to the conscience of mankind"; cuts, scrapes, contusions actionable); *see* Williams v. Benjamin, 77 F.3d 756, 761 (4th Cir. 1996) ("Although an inmate asserting an excessive force claim is thus required to meet [a] *more* demanding standard with regard to the subjective component of Eighth Amendment analysis, the objective component of an excessive force claim is *less* demanding than that necessary for conditions-of-confinement or inadequate medical care claims.")

[106] Harris v. Chapman, 97 F.3d 499, 505-06 (11th Cir. 1996) (where officer snapped the plaintiff's head back in a towel, kicked him, and subjected him to racial abuse, more than *de minimis* injury was shown); Felix v. McCarthy, 939 F.2d 699, 702 (9th Cir. 1991), *cert. denied*, 502 U.S. 1093 (1992); Campbell v. Grammer, 889 F.2d 797, 802 (8th Cir. 1989); Smith v. Marcellus, 917 F.Supp. 168, 173-74 (W.D.N.Y. 1995).

[107] Northington v. Jackson, 973 F.2d 1518, 1524 (10th Cir. 1992); Davis v. Locke, 936 F.2d 1208, 1212 (11th Cir. 1991) (dropping a shackled inmate so he hit his head violated the Fourteenth Amendment); Jackson v. Crews, 873 F.2d 1105, 1108 (8th Cir. 1989); Wilkins v. May, 872 F.2d 190, 195 (7th Cir. 1989), *cert. denied*, 493 U.S. 1026 (1990); Parrish v. Johnson, 800 F.2d 600, 605 (6th Cir. 1986) (verbal threats and waving of knife violated the Eighth Amendment); Burton v. Livingston, 791 F.2d 97, 100 (8th Cir. 1986); Black v. Stephens, 662 F.2d 181, 189 (3d Cir. 1981), *cert. denied*, 455 U.S. 1008 (1982); Jones v. Huff, 789 F.Supp. 526, 536 (N.D.N.Y. 1992) (ripping a prisoner's clothes off was unconstitutional because "done maliciously with the intent to humiliate him").

[108] Scott v. Coughlin, 344 F.3d 282, 291 (2d Cir. 2003).

3. Bystander, supervisory, and entity liability

When multiple defendants are involved in a use of force, courts "reject the argument that the force administered by each defendant in this collective beating must be analyzed separately to determine which of the defendants' blows, if any, used excessive force."[109] Officers who are present and fail to take reasonable steps to prevent excessive force may be held liable.[110] The deliberate indifference standard is applicable to defendants who do not directly use force.[111] The persistent failure to control and discipline officers who misuse force can support a finding of deliberate indifference by supervisors or municipality.[112]

4. Sexual abuse

"[S]evere or repetitive sexual abuse" of prisoners can be serious enough to violate the Eighth Amendment, and can demonstrate a sufficiently culpable state of mind as well.[113]

E. Other conditions of confinement issues

1. Shelter

A prisoner must be provided with "shelter which does not cause his degeneration or

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[109] Skrtich v. Thornton, 280 F.3d 1295, 1302 (11th Cir. 2002).

[110] Skrtich v. Thornton, *id.*

[111] *See* § I.A.2, above.

[112] Beck v. City of Pittsburgh, 89 F.3d 966 (3d Cir. 1996) (process "structured to curtail disciplinary action and stifle investigations" could support municipal liability), cert. denied, 519 U.S. 1151 (1997); Vann v. City of New York, 72 F.3d 1040, 1051 (2d Cir. 1995) (inadequate monitoring of identified "problem" officers could support liability); Madrid v. Gomez, 889 F.Supp. 1146, 1249 (N.D.Cal. 1995) (prison officials liable for "abdicating their duty to supervise and monitor the use of force and deliberately permitting a pattern of excessive force to develop and persist.")

[113] Boddie v. Schneider, 105 F.3d 857, 861 (2d Cir. 1997); *see* Smith v. Cochran, 339 F.3d 1205, 1212-13 (10th Cir. 2003) (holding that sexual abuse or rape by staff is "malicious and sadistic" by definition); Riley v. Olk-Long, 282 F.3d 592 (8th Cir. 2002) (affirming damage award against supervisors found deliberately indifferent); Mathie v. Fries, 121 F.3d 808, 811-12 (2d Cir. 1997) (affirming trial court's finding of Eighth Amendment violation).

threaten his mental and physical well being."[114]

2. Crowding

The constitutionality of crowding is determined by circumstances and consequences.[115] The less out-of-cell activity prisoners are permitted, the more likely it is that crowding will be found unconstitutional.[116] Crowding that is linked with violence or other safety hazards, breakdowns in security classification, food services, or medical care, or deteriorated physical plant, is also more likely to be found unconstitutional[117]–though courts may try to remedy the consequences without remedying the crowding.[118] (Indeed, the Prison Litigation Reform Act requires courts to take that approach.[119]) Crowding that results in prisoners' sleeping on floors, in corridors, or other non-housing areas has been found unconstitutional,[120] though the cases are

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[114] Ramos v. Lamm, 639 F.2d 559, 568 (10th Cir. 1980), *cert. denied*, 450 U.S. 1041 (1981); *see* Johnson v. Lewis, 217 F.3d 726, 732-33 (9th Cir. 2000) (holding prisoners held in prison yard for days in heat and rain provided evidence of a substantial deprivation of shelter), *cert. denied*, 532 U.S. 1065 (2001); Carty v. Farrelly, 957 F.Supp. 727, 736 (D.V.I. 1997) ("In particular, the state of disrepair of the facilities (including plumbing, heating, ventilation, and showers) and the effect that substandard conditions have on the inmates' sanitation and health informs whether the prison provides an inhabitable shelter for Eighth Amendment purposes.")

[115] Rhodes v. Chapman, 452 U.S. 337 (1981) (holding double celling did not violate the Eighth Amendment in a modern facility in good condition with adequate safety, shelter, and programs); *see* Bell v. Wolfish, 441 U.S. 520, 542 (1979) (holding similarly to *Rhodes* in pre-trial detainee facility).

[116] *See* Hall v. Dalton, 34 F.3d 648, 650 (8th Cir. 1994); Moore v. Morgan, 922 F.2d 1553, 1555 n.1 (11th Cir. 1991); French v. Owens, 777 F.2d 1250, 1252-53 (7th Cir. 1985), *cert. denied*, 479 U.S. 817 (1986).

[117] Tillery v. Owens, 907 F.2d 418, 427 (3d Cir. 1990); French v. Owens, *id.* *See* Benjamin v. Fraser, 343 F.3d 35, 53 (2d Cir. 2003) (reversing order requiring spacing of beds to limit spread of communicable diseases absent a showing of actual or imminent harm).

[118] *See, e.g.*, Fisher v. Koehler, 692 F.Supp. 519 (S.D.N.Y. 1988), *injunction entered*, 718 F.Supp. 1111 (S.D.N.Y. 1990), *aff'd*, 902 F.2d 2 (S.D.N.Y. 1990). In *Fisher*, the court found that crowding contributed to unconstitutional levels of violence, but did not initially grant crowding relief based on defendants' representations that they could cure the problem without it. They didn't, and a population cap was imposed by subsequent unreported order.

[119] *See* 18 U.S.C. § 3626(a)(3) (restricting "prisoner release orders").

[120] Moore v. Morgan, 922 F.2d 1553, 1559 n. 1 (11th Cir. 1991); Mitchell v. Cuomo, 748 F.2d 804, 807 (2d Cir. 1984) (infirmaries, program rooms, storage areas, etc.); LaReau v. Manson, 651

far from unanimous and outcomes depend on the overall circumstances.[121]

3. Food

Prison food must be nutritionally adequate[122] and "prepared and served under conditions which do not present an immediate danger to the health and well being of the inmates who consume it."[123] Contamination of drinking water may be unconstitutional.[124]

4. Clothing

Prisoners are entitled to clothing that is "at least minimally adequate for the conditions under which they are confined."[125] They must be provided clean clothing or a reasonable opportunity to clean it themselves.[126] The extent to which prisoners can be deprived of clothing as a behavior control mechanism is unsettled.[127]

F.2d 96, 105-08 (2d Cir. 1981) ("fishtank" dayroom, medical isolation cells); Benjamin v. Sielaff, 752 F.Supp. 140 (S.D.N.Y. 1990) (floors of intake pens); Albro v. County of Onondaga, N.Y., 627 F.Supp. 1280, 1287 (N.D.N.Y. 1986) (corridors).

[121] *Compare* Moore v. Morgan, *id.*, *with* Brown v. Crawford, 906 F.2d 667, 672 (11th Cir. 1990) (holding sleeping on a mattress on the floor was not unconstitutional unless imposed "arbitrarily").

[122] Phelps v. Kapnolas, 308 F.3d 180, 186 (2d Cir. 2002).

[123] Ramos v. Lamm, 639 F.2d 559, 570-71 (10th Cir. 1980), *cert. denied*, 450 U.S. 1041 (1981); *see* Benjamin v. Fraser, 343 F.3d 35, 56-57 (2d Cir. 2003) (vacating finding of no constitutional violation where some jails had "serious sanitary problems").

[124] Jackson v. Duckworth, 955 F.2d 21, 22 (7th Cir. 1992); Jackson v. Arizona, 885 F.2d 639, 641 (9th Cir. 1989).

[125] Knop v. Johnson, 667 F.Supp. 467, 475-77 (W.D.Mich. 1987) (requiring heavy jackets, hats, gloves or mittens, and boots or heavy socks for Michigan winters), *aff'd in pertinent part*, 977 F.2d 966, 1012 (6th Cir. 1992), *cert. denied*, 507 U.S. 973 (1993); *accord*, Davidson v. Coughlin, 920 F.Supp. 305 (N.D.N.Y. 1996).

[126] Divers v. Dep't of Corrections, 921 F.2d 191, 194 (8th Cir. 1990).

[127] *See* Trammell v. Keane, 338 F.3d 155, 163, 165-66 (2d Cir. 2002) (upholding deprivation of clothing other than shorts for two weeks to prisoner who defied ordinary disciplinary sanctions); Beckford v. Portuondo, 151 F.Supp.2d 204, 211-12 (N.D.N.Y. 2001) (deprivation of all clothing and bedding because prisoner would not cut a fingernail could be found "grossly disproportionate to the alleged infraction"); Wilson v. City of Kalamazoo, 127 F.Supp.2d 855, 861 (W.D.Mich. 2000)

5. Safety

The Eighth Amendment requires prison officials to provide "reasonable safety" for prisoners.[128] That principle encompasses protection from assault by other prisoners occasioned by the affirmative acts of staff[129] or by staff's failure to respond to known risks of assault.[130] The Eighth Amendment also protects against from dangerous living and working conditions as well, including:

Exposure to environmental tobacco smoke.[131]

Exposure to sewage or human waste.[132]

(holding deprivation of all clothing including underwear to alleged suicide risks stated Fourth and Fourteenth Amendment claims).

[128] Helling v. McKinney, 509 U.S. 25, 33 (1993).

[129] *See* Snider v. Dylag, 188 F.3d 51, 55 (2d Cir. 1999) (assault invited by staff member's statements to other inmates is actionable); Fischl v. Armitage, 128 F.3d 50 (2d Cir. 1997) (assault made possible by officer's actions is actionable); Glover v. Alabama Department of Corrections, 734 F.2d 691, 693-94 (11th Cir. 1984) (affirming liability of official who publicly offered a reward for assaulting the plaintiff), *cert. granted, vacated and remanded on other grounds*, 474 U.S. 806 (1985).

[130] Cotton v. Jenne, 326 F.3d 1352, 1358-59 (11th Cir. 2003) (holding that allegations that a prisoner was placed in a segregated housing unit for mentally ill inmates, and strangled by a violent schizophrenic while staff played computer games rather than watching a surveillance camera, stated an Eighth Amendment claim); Hendricks v. Coughlin, 942 F.2d 109 (2d Cir. 1991); Morales v. New York State Dep't of Corrections, 842 F.2d 27 (2d Cir. 1988). *But see* Carter v. Galloway, 352 F.3d 1346, 1349-50 (11th Cir. 2003) (holding prison officials' knowledge that a prisoner was "acting crazy" and making ambiguous statements did not put them on notice of a risk of assault; defendants are not obliged "to read imaginatively all derogatory and argumentative statements made between prisoners to determine whether substantial risks of serious harm exist.")

Prison staff may be held liable for inmate-inmate assaults based on actual knowledge of a generalized risk of assault created by prison conditions or practices; they need not be shown to have known that the particular prisoner was at risk from a particular assailant. *See* n. 8, above.

[131] Helling v. McKinney, 509 U.S. at 35; Davis v. New York, 316 F.3d 93 (2d Cir. 2002); Gill v. Smith, 283 F.Supp.2d 763 (N.D.N.Y. 2003).

[132] DeSpain v. Uphoff, 264 F.3d 965, 977 (10th Cir. 2001); Burton v. Armontrout, 975 F.2d 543, 545 n.2 (8th Cir. 1992), *cert. denied*, 508 U.S. 972 (1993).

Exposure to other toxic substances.[133]

Failure to correct safety hazards in living or working areas.[134]

Work assignments inconsistent with medical condition or physical capacity.[135]

Lack of fire safety.[136]

6. Temperature and ventilation

Prisoners are entitled to protection from extremes of heat and cold,[137] and also to "reasonably adequate ventilation."[138] The Eleventh Circuit, however, has held that a showing of "severe discomfort" does not meet the constitutional standard, and subjection to temperatures that only exceeded 90 degrees nine per cent of the time during the summer and exceeded 95

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[133] Herman v. Holiday, 238 F.3d 660 (5th Cir. 2001) (asbestos); LaBounty v. Coughlin, 137 F.3d 68 (2d Cir. 1998) (asbestos); Powell v. Lennon, 914 F.2d 1459, 1463 (11th Cir. 1990) (asbestos); Johnson-El v. Schoemehl, 878 F.2d 1043, 1045-55 (8th Cir. 1989) (pesticides); Crawford v. Coughlin, 43 F.Supp.2d 319 (W.D.N.Y. 1999) (dangerous chemicals in industrial shop).

[134] Gill v. Mooney, 824 F.2d 192, 195 (2d Cir. 1987) (unsafe ladder); Curry v. Kerik, 163 F.Supp.2d 232 (S.D.N.Y. 2001) (hazardous shower conditions); *see* Brown v. Missouri Dep't of Corrections, 353 F.3d 1038, 1040 (8th Cir. 2004) (per curiam) (holding that allegation that transportation officers refused to fasten the seat belt of a restrained prisoner and then drove recklessly stated a deliberate indifference claim).

[135] Williams v. Norris, Arkansas Dep't of Corrections, 148 F.3d 193 (8th Cir. 1998); Baumann v. Walsh, 36 F.Supp.2d 508 (N.D.N.Y. 1999).

[136] Hoptowit v. Spellman, 753 F.2d 779, 784 (9th Cir. 1985); Benjamin v. Kerik, 1998 WL 799161 (S.D.N.Y., Nov. 13, 1998).

[137] Gates v. Cook, 376 F.3d 323, 339-40 (5th Cir. 2004) (affirming finding of unconstitutional heat); Benjamin v. Fraser, 343 F.3d 35, 52 (2d Cir. 2003) (affirming finding of unconstitutionality based on evidence of extreme temperatures, including no heat at times during winter; detainee case); Gaston v. Coughlin, 249 F.3d 156, 164-65 (2d Cir. 2001) (holding allegations of unrepaired broken windows throughout winter stated a constitutional claim); Palmer v. Johnson, 193 F.3d 346, 352-53 (5th Cir. 1999).

[138] Benjamin v. Fraser, 161 F.Supp.2d 151, 160 (S.D.N.Y. 2001) (detainee case), *aff'd in pertinent part*, 343 F.3d 35, 52 (2d Cir. 2003), *quoting* Ramos v. Lamm, 639 F.2d 559, 568 (10th Cir. 1980), *cert. denied*, 450 U.S. 1041 (1981); Jones v. City and County of San Francisco, 976 F.Supp 896, 912-13 (N.D.Cal. 1997).

degrees only seven times during the summer, with an effectively functioning ventilation system, was not unconstitutional.[139]

7. Exercise

Prisoners must be provided some opportunity to exercise, and restrictions on that right must be limited to "unusual circumstances" or those in which exercise is "impossible" for disciplinary reasons.[140] Most courts have held that five hours of exercise a week is required under ordinary circumstances.[141] Deprivations of exercise for relatively short periods are usually upheld, which may help account for the Eleventh Circuit's holding that the failure to provide outdoor exercise in a county jail, with no indoor exercise except in a dayroom providing 15 square feet per prisoner, did not constitute punishment of a detainee held there for two and a half months.[142] The Eleventh Circuit has also held that the denial to extremely high-security prisoners of even the two hours' outdoor exercise the "Close Management" unit allowed, based on conduct involving violence, attempted escape, or weapons possession in the unit, did not constitute cruel and unusual punishment in light of the penological justification for it.[143]

8. Sanitation and personal hygiene

"A sanitary environment is a basic human need that a penal institution must provide for all inmates."[144] Prison officials must make arrangements for cleaning and sanitation of the

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[139] Chandler v. Crosby, 379 F.3d 1278, 1295-98 (11th Cir. 2004).

[140] Williams v. Greifinger, 97 F.3d 699, 704-05 (2d Cir. 1996) (holding 589 days' denial of all out-of-cell exercise violated clearly established rights); *see* Williams v. Goord, 142 F.Supp.2d 416 (S.D.N.Y. 2001) (holding that allegation that plaintiff was shackled during exercise periods for 28 days stated a constitutional claim, albeit a "close" one); Davidson v. Coughlin, 968 F.Supp. 121 (S.D.N.Y. 1997) (holding occasional deprivations and repeated shortening of one-hour recreation period not unconstitutional).

[141] *See* Davenport v. DeRobertis, 844 F.2d 1310, 1315 (7th Cir. 1988).

[142] *See* Wilson v. Blankenship, 163 F.3d 1284, 1291-94 (11th Cir. 1998).

[143] Bass v. Perrin, 170 F.3d 1312, 1316-17 (11th Cir. 1999). The court did, however, hold that state regulations providing for two hours' yard time created a liberty interest protected by due process. *Id.* at 1318.

[144] Toussaint v. McCarthy, 597 F. Supp. 1397, 1411 (N.D. Cal. 1984), *aff'd in part and rev'd in part on other grounds*, 801 F.2D 1080 (9th Cir. 1986), *cert. denied*, 481 U.S. 1069 (1987); *accord*, Alexander v. Tippah County, Miss., 351 F.3d 626, 630-31 (5th Cir. 2003) (citing "basic human need for sanitary living conditions"), *cert. denied*, 124 U.S. 2071 (2004); *see* Benjamin v. Fraser, 161

prison[145] and must control infestations of vermin.[146] They must also permit prisoners reasonable opportunities to maintain personal cleanliness.[147] Access to sanitary toilet facilities is required.[148]

9. Sleep

". . . [S]leep undoubtedly counts as one of life's basic needs. Conditions designed to prevent sleep, then, might violate the Eighth Amendment."[149]

10. Noise

"Excessive noise 'inflicts pain without penological justification' and may violate the Eighth Amendment."[150]

F.Supp.2d 151, 179-80 (S.D.N.Y. 2001), *aff'd in pertinent part*, 343 F.3d 52 (2d Cir. 2003).

In *Alexander* the court assumed that certain "deplorable" conditions of confinement could be serious enough to violate the Eighth Amendment, but questioned whether 24 hours of them met the standard. 351 F.3d at 631.

[145] Gillespie v. Crawford, 833 F. 2d 47, 50 (5th Cir. 1987), on rehearing, 858 F. 2d 1101 5th Cir. 1988); Hoptowit v. Spellman, 753 F. 2d 779, 784 (9th Cir. 1985) (failure to provide adequate cleaning supplies).

[146] Gates v. Cook, 376 F.3d 323, 334 (5th Cir. 2004); Gaston v. Coughlin, 249 F.3d 156, 166 (2d Cir. 2001).

[147] Carver v. Bunch, 946 F.2d 451, 452 (6th Cir. 1991) (holding that an allegation of two-week denial of personal hygiene items stated an Eighth Amendment claim); Johnson v. Pelker, 891 F.2d 136, 139 (7th Cir. 1989) (holding three-day denial of water in filthy cell stated an Eighth Amendment claim); Tillery v. Owens, 719 F.Supp. 1256, 1272 (W.D.Pa. 1989), (holding that limiting general population prisoners to three showers a week "deprives the inmates of basic hygiene and threatens their physical and mental well-being"), *aff'd*, 907 F.2d 418 (3d Cir. 1990).

[148] Gates v. Cook, 376 F.3d 323, 341 (5th Cir. 2004) (requiring defective toilet plumbing to be corrected); LaReau v. MacDougall, 473 F.2d 974, 978 (2d Cir. 1972) (forbidding use of "Chinese toilet"), *cert. denied*, 414 US. 878 (1973); Mitchell v. Newryder, 245 F.Supp.2d 200 (D.Me. 2003) (holding plaintiff who soiled himself while locked into a cell without a toilet stated an Eighth Amendment claim).

[149] Harper v. Showers, 174 F.3d 716, 720 (5th Cir. 1999); *see* Gates v. Cook, 376 F.3d 323, 340, 343 (5th Cir. 2004) (citing sleep deprivation as factor supporting relief from vermin infestation and neglect of mentally ill).

[150] Benjamin v. Fraser, 161 F.Supp.2d at 185, *quoting* Toussaint v. McCarthy, 801 F.2d 1080, 1110 (9th Cir. 1986), *cert. denied*, 481 U.S. 1069 (1987), and cases cited.

11. Lighting

"Lighting is an indispensable aspect of adequate shelter and is required by the Eighth Amendment."[151] Constant illumination has been held unconstitutional.[152]

12. Programs, activities, and idleness

In general, there is no constitutional right to educational, vocational, work, or other programs in prison,[153] though state law may create a property interest in an education that is protected by due process.[154] The federal Individuals with Disabilities Education Act,[155] which protects rights to special education, is applicable in prisons and jails,[156] and the federal disability statutes, discussed below, require prisoners with disabilities to have access to the programs that prisons offer. Idleness is not unconstitutional[157] unless it is shown to have serious consequences like mental deterioration or increased violence.[158] There is no federal constitutional right to

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[151] Toussaint v. McCarthy, 597 F.Supp. 1388, 1409 (N.D.Cal. 1984) (requiring enough light for each inmate to read comfortably while seated or lying on bunk), *aff'd in part and rev'd in part on other grounds,* 801 F.2d 1080 (9th Cir. 1986), *cert. denied*, 481 U.S. 1069 (1987); *accord*, Gates v. Cook, 376 F.3d 323, 341-42 (5th Cir. 2004) (requiring 20 foot-candles of light in each cell). *But see* Benjamin v. Fraser, 343 F.3d 35, 52, 54-55 (2d Cir. 2003) (affirming finding of inadequate lighting, questioning basis of 20 foot-candle remedy).

[152] Keenan v. Hall, 83 F.3d 1083, 1090-01 (9th Cir. 1996).

[153] Newman v. Alabama, 559 F.2d 283, 292 (5th Cir. 1977), *cert. denied sub nom.* Alabama v. Pugh, 438 U.S. 915 (1978); Hoptowit v. Ray, 682 F.2d 1237, 1254-55 (9th Cir. 1982).

[154] Handberry v. Thompson, 92 F.Supp.2d 244, 248 (S.D.N.Y. 2000), *appeal docketed*, 03-0047 (2d Cir.); *see* Goss v. Lopez, 419 U.S. 565, 574-76 (1975).

[155] 20 U.S.C. § 1400 *et seq.*

[156] Handberry v. Thompson, 219 F.Supp.2d 525, 531-32 (S.D.N.Y. 2002), *appeal docketed*, 03-0047 (2d Cir.); Alexander S. v. Boyd, 876 F.Supp. 773, 788 (D.S.C. 1995); Donnell v. Illinois State Bd. Of Educ., 829 F.Supp. 1016, 1020 (N.D.Ill. 1993).

[157] Women Prisoners of the D.C. Dep't of Correction v. District of Columbia, 93 F.3d 910, 927 (D.C.Cir. 1996); Peterkin v. Jeffes, 855 F.2d 1021, 1029-30 (3d Cir. 1988); Toussaint v. McCarthy, 801 F.2d 1080, 1106-07 (9th Cir. 1986), *cert. denied*, 481 U.S. 1069 (1987) and cases cited.

[158] Madrid v. Gomez, 889 F.Supp. 1146, 1264-65 (N.D.Cal. 1995) (holding mentally ill prisoners must be excluded from regime of idleness of isolation unit to avoid aggravating their illnesses); Knop v. Johnson, 667 F.Supp. 512, 522-23 (E.D.Mich. 1987) (holding idleness may be

rehabilitation,[159] except for persons sentenced under a statute that makes the length of incarceration contingent upon it. They have been held entitled to "a treatment program that will address their particular needs with the reasonable objective of rehabilitation,"[160] though recent developments call that holding into question.[161]

13. Disability rights

Prison officials' treatment of disabled prisoners has been found to violate the Eighth Amendment on a number of occasions.[162]

In addition, the federal disability statutes apply to prisoners.[163] Both Title II of the Americans with Disabilities Act[164] and Section 504 of the Rehabilitation Act[165] prohibit

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remedied where it promotes violence), *aff'd in part and rev'd in part on other grounds,* 977 F.2 996 (6th Cir. 1992), *cert. denied,* 507 U.S. 973 (1993).

[159] Women Prisoners of the D.C. Dep't of Correction v. District of Columbia, 93 F.3d 910, 927 (D.C.Cir. 1996); Hoptowit v. Ray, 682 F.2d 1237, 1254 (9th Cir. 1982).

[160] Ohlinger v. Watson, 652 F.2d 775, 777-79 (9th Cir. 1980).

[161] *See* Kansas v. Hendricks, 521 U.S. 346, 365-66 (1997) (suggesting that incapacitation may justify civil commitment of persons with untreatable disorders).

[162] *See, e.g.*, Lawson v. Dallas County, 286 F.3d 257 (5th Cir. 2002) (affirming damages for medical neglect and inhumane treatment of paraplegic prisoner); LaFaut v. Smith, 834 F.2d 389, 392-94 (4th Cir. 1987) (holding deprivation of prescribed rehabilitation therapy and adequate toilet facilities violated Eighth Amendment); *see* Miller v. King, 384 F.3d 1248, 1261-62 (8th Cir. 2004) (holding that allegations by wheelchair-bound paraplegic of denial of wheelchair repairs, physical therapy, medical consultations, leg braces, and orthopedic shoes, wheelchair-accessible showers and toilets, opportunity to bathe, urinary catheters, and assistance in using the toilet raised a material factual issue under the Eighth Amendment).

[163] Pennsylvania Dep't of Corrections v. Yeskey, 524 U.S. 206 (1998) (Americans with Disabilities Act); Miller v. King, 344 F.3d at 1263 (ADA); Harris v. Thigpen, 941 F.3d 1495, 1522 n.41 (11th Cir. 1991) (Rehabilitation Act); Bonner v. Lewis, 857 F.2d 559 (9th Cir. 1988) (Rehabilitation Act).

[164] 42 U.S.C. § 12101 *et seq.*

[165] 29 U.S.C. § 794.

discriminating against "otherwise qualified" disabled persons[166] or excluding them from participation in or the benefits of the services, programs, or activities of, respectively, any public entity, and any program or activity (i.e., agency) that receives federal funding. The disability statutes arguably provide a more favorable standard for prisoners than any cognate constitutional claims because they require defendants to make reasonable accommodations to prisoners' disabilities, and reasonableness under the ADA often requires costly physical renovations or other expenditures,[167] as compared to the "*de minimis* cost" solutions prescribed under the reasonableness standard applied to other prisoner claims by *Turner v. Safley*.[168] However, some courts have held that the ADA/Rehabilitation Act standard must be interpreted consistently with the *Turner* reasonable relationship standard,[169] or may be informed by it.[170]

Relief under the disability statutes has been granted to prisoners with hearing

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[166] *See* Thompson v. Davis, 295 F.3d 890, 896 (9th Cir. 2002) (holding that persons who were statutorily eligible for parole sufficiently pled they were "otherwise qualified" for the public benefit of parole consideration); Onishea v. Hopper, 171 F.3d 1289, 1297 (11th Cir. 1999) (en banc) (holding prisoners with infectious diseases are "otherwise qualified" for prison jobs only if the risk of transmission of the disease will eliminate the risk), *cert. denied*, 528 U.S. 1114 (2000). The precise statutory term is "qualified individual with a disability," which means "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8).

[167] *But see* Olmstead v. L.C., 525 U.S. 1062, 527 U.S. 581, 607 (1998) (holding that state's ADA obligations are determined "taking into account the resources available to the state").

[168] *See* § II.A, below.

[169] Gates v. Rowland, 39 F.3d 1439, 1446-47 (9th Cir. 1994) (holding *Turner* standard applicable under ADA). *Contra,* Amos v. Maryland Dep't of Public Safety and Correctional Services, 178 F.3d 212, 220 (4th Cir. 1999) (rejecting application of *Turner* as inconsistent with *Yeskey*), *dismissed as settled*, 205 F.3d 687 (4th Cir. 2000).

[170] Onishea v. Hopper, 171 F.3d 1289, 1300-01 (11th Cir. 1999) (en banc) (holding the *Turner* standard helpful in applying ADA), *cert. denied*, 528 U.S. 1114 (2000).

impairments,[171] visual impairments,[172] mobility impairments,[173] mental illness,[174] and other disabilities.[175]

The Eleventh Circuit has held that Title II of the ADA is invalid as applied to damage claims against state prison officials,[176] though it is valid as applied to injunctive claims.[177] This Eleventh Amendment defense is not available for claims under the Rehabilitation Act, which applies only to agencies that receive federal funds and rests on Congress's Spending Clause authority, and not just on its authority under section 5 of the Fourteenth Amendment. Ongoing acceptance of federal funds waives the Eleventh Amendment defense to Rehabilitation Act claims.[178]

II. Prisoners' Civil Liberties

A. The reasonable relationship standard

". . . [W]hen a prison regulation impinges on inmates' constitutional rights, the regulation

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[171] Clarkson v. Coughlin, 898 F.Supp. 1019 (S.D.N.Y. 1995); *see* Duffy v. Riveland, 98 F.3d 447 (9th Cir. 1996) (holding deaf prisoner might be entitled to certified interpreter in disciplinary hearings).

[172] Williams v. Illinois Dep't of Corrections, 1999 WL 1068669 (N.D. Ill. 1999).

[173] Love v. Westville Correctional Center, 103 F.3d 558 (7th Cir. 1996).

[174] Sites v. McKenzie, 423 F.Supp. 1190 (N.D.W.Va. 1976).

[175] Raines v. State of Florida, 983 F.Supp. 1362 (N.D.Fla. 1997) (various disabilities; court held their exclusion from the highest class of "incentive gain time" violated the ADA); Armstrong v. Wilson, 942 F.Supp. 1252 (N.D.Cal. 1996), *aff'd*, 124 F.3d 1019 (9th Cir. 1997) (mobility, hearing, vision, kidney, and learning disabilities).

[176] Miller v. King, 384 F.3d 1248, 1268-76 (11th Cir. 2004). To date, *Miller* is the only circuit decision to examine this question in light of the Supreme Court's decision in *Tennessee v. Lane*, 124 S.Ct. 1978 (2004), which upheld Title II as applied to a claim of unequal access to public services, and which mentioned unequal treatment in the penal system as an example of such conduct. *Id.* at 1989 and n.11.

[177] Miller v. King, 384 F.3d at 1263-67.

[178] Garrett v. University of Ala. at Birmingham Bd. of Trustees, 344 F.3d 1288, 1293 (11th Cir. 2003).

is valid if it is reasonably related to legitimate penological interests. . . ."[179] The reasonableness question is answered by weighing[180] four factors:

- Whether there is a "valid, rational connection" between the prison regulation and the legitimate governmental interest put forward to justify it. . . . [A] regulation cannot be sustained where the logical connection between the regulation and the asserted goal is so remote as to render the policy arbitrary or irrational. Moreover, the governmental objective must be a legitimate and neutral one. . . ."[181] If this requirement is not met, the regulation is unconstitutional regardless of the other factors.[182] Prison policies can fail this test either because the asserted goal is not legitimate[183] or because the policy is not logically related to it.[184] Whether the bare desire to make prison more unpleasant in the

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[179] Turner v. Safley, 482 U.S. 78, 89 (1987); *accord*, O'Lone v. Estate of Shabazz, 482 U.S. 342, 349 (1987).

[180] "*Turner* does not call for placing each factor in one of two columns and tallying a numerical result. . . . *Turner* does contemplate a judgment by the court regarding the reasonableness of the defendants' conduct under all of the circumstances reflected in the record." DeHart v. Horn, 227 F.3d 47, 59 (3d Cir. 2000) (en banc).

[181] *Turner*, 482 U.S. at 89; *see* Bahrampour v. Lampert, 356 F.3d 969, 976 (9th Cir. 2004) ("These categorical restrictions [on publications] are neutral because they target the effects of the particular types of materials, rather than simply prohibiting broad selections of innocuous materials.")

[182] Shaw v. Murphy, 532 U.S. 223, 229-30 (2001).

[183] *See Turner*, 482 U.S. at 98-99 (finding ban on marriage not logically connected with asserted purpose; noting paternalism toward women is not a legitimate interest); Walker v. Sumner, 917 F.3d 382, 387 (9th Cir. 1990) (stating that training of state health care workers would be a "highly dubious" justification for mandatory AIDS testing); Goodwin v. Turner, 908 F.2d 1395, 1399 n.7 (8th Cir. 1990) (stating that concerns such as decreasing welfare rolls were not legitimate penological interests); Monmouth County Correctional Institution Inmates v. Lanzaro, 834 F.2d 326, 342-43 (3d Cir.) (holding abortion restrictions were not justified by state's interest in childbirth because this interest does not further rehabilitation, security, or deterrence), *cert. denied*, 486 U.S. 1066 (1987).

[184] *See* Clement v. California Dep't of Corrections, 364 F.3d 1148, 1152 (9th Cir. 2003) (holding that a ban on receipt of material printed from the Internet was an arbitrary way of reducing the volume of mail and had no rational relation to security risks); Shimer v. Washington, 100 F.3d 506, 510 (7th Cir. 1996) (questioning connection of defendants' policy with its objectives); Allen v. Coughlin, 64 F.3d 77 (2d Cir. 1995) (alleged danger of inflammatory material did not justify ban on newspaper clippings in letters when entire newspapers were allowed in).

service of punishment and deterrence is a legitimate interest, and if so how it could possibly fit into the *Turner* reasonableness analysis, has not been resolved.[185]

- ". . . [W]hether there are alternative means of exercising the right that remain open to prison inmates. . . ."[186] What constitutes an alternative is debatable.[187]

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[185] *See* Kimberlin v. U.S. Dep't of Justice, 318 F.3d 228 (D.C.Cir.) (upholding statute prohibiting use of federal funds for use or possession of electric musical instruments), *rehearing denied*, 351 F.3d 1166 (D.C.Cir. 2003). *Compare* Kimberlin v. U.S. Dep't of Justice, 150 F.Supp.2d 36, 44-45 (D.D.C. 2001) (adopting punitive rationale); *see* 318 F.3d at 239-40 (concurring and dissenting opinion) (noting incompatibility of punitive rationale and *Turner* standard).

[186] *Turner*, 482 U.S. at 90.

[187] *Compare* Fraise v. Terhune, 283 F.3d 506, 519 (3d Cir. 2002) (holding that Five Percenters seeking to study religious material that was banned had alternatives because the Bible and Koran are also acknowledged as "lessons" by the Five Percenters and they were allowed to "discuss[] and seek[] to achieve self-knowledge, self-respect, responsible conduct, [and] righteous living.") *with* Sutton v. Rasheed, 323 F.3d 236, 255 (3d Cir. 2003) (holding Nation of Islam plaintiffs did not have alternatives when deprived of religious texts "which provide critical religious instruction and without which they could not practice their religion generally"; *Fraise* distinguished because the texts at issue there lacked the "sacrosanct and fundamental quality which the writings of the prophet, Elijah Muhammad, or the writings of Minister Farrakhan, have for members of one or another sect of the Nation of Islam."). *Compare* Beerheide v. Suthers, 286 F.3d 1179, 1189 (10th Cir. 2002) (holding plaintiffs denied a kosher diet lacked alternative ways of maintaining a kosher diet; paying for it themselves was not an alternative because even those with some money would have to sacrifice communication with family and legal representatives to pay for the food) *with* DeHart v. Horn, 227 F.3d 47 (3d Cir. 1999) (holding that a Buddhist denied a religious diet had alternatives because he was permitted to pray, to recite the Sutras, to meditate, to correspond with the City of 10,000 Buddhas, a center of Buddhist teaching, and to purchase non-leather sneakers); *accord,* Goff v. Graves, 362 F.3d 543, 549-50 (8th Cir. 2004) (upholding refusal to allow food trays prepared for religious banquet to be delivered to members in segregation unit; noting that members could practice other aspects of their religion); *see* Bahrampour v. Lampert, 356 F.3d 969, 976 (9th Cir. 2004) (stating that the plaintiff can play or read about chess rather than role-playing games, and receive bodybuilding publications without the simulated sexual activity in the disputed magazines); Johnson v. California, 321 F.3d 791, 803 (9th Cir. 2003) (stating that alternatives must be viewed "expansively and sensibly . . .; thus, we must look to Johnson's right to be free from state-sponsored racial discrimination at a macro level, and not just the alleged violation"; holding that since the period of segregation was 60 days and the prisoners were otherwise integrated, alternatives exist), *cert. granted*, 124 S.Ct. 1505 (2004); Morrison v. Hall, 261 F.3d 896, 904 and n.6 (9th Cir. 2001) (prisoners challenging a ban on magazines sent by third and fourth class mail had no alternative because they could not make publishers use different mailing rates, radio and TV are not alternatives to reading, and many prisoners can't afford higher rates anyway); Flagner v. Wilkinson, 241 F.3d

- ". . . [T]he impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally. . . . When accommodation of an asserted right will have a significant "ripple effect" on fellow inmates or on prison staff, courts should be particularly deferential to the informed discretion of prison officials. . . ."[188]

- ". . . [T]he absence of ready alternatives is evidence of the reasonableness of a prison regulation. By the same token, the existence of obvious, easy alternatives may be evidence that the regulation is not reasonable, but is an 'exaggerated response' to prison concerns. . . . But if an inmate claimant can point to an alternative that fully accommodates the prisoner's rights at *de minimis* cost to valid penological interests, a court may consider that as evidence that the regulation does not satisfy the reasonable relationship standard."[189]

475, 486 (6th Cir. 2001) (holding that a Jewish prisoner required to cut his beard and sidelocks had no alternatives because no other aspects of his religion could compensate for having to violate an essential tenet); Chriceol v. Phillips, 169 F.3d 313 (5th Cir. 1999) (holding that the right to read other materials was an alternative for a prisoner who wanted Aryan Nations material); Allen v. Coughlin, 64 F.3d 77 (2d Cir. 1995) (subscriptions and interlibrary loan were not necessarily adequate alternatives to receiving newspaper clippings in correspondence); Giano v. Senkowski, 54 F.3d 1050, 1056 (2d Cir. 1995) ("If Giano's right is framed as the right to graphic sexual imagery to satisfy carnal desires and expressions, commercially produced erotica and sexually graphic written notes from wives or girlfriends are adequate substitutes for semi-nude personal photographs. If, on the other hand, the right is seen as reinforcing the emotional bond between loved ones and similar affective links, conventional photographs and romantic letters would adequately satisfy this need.")

[188] *Turner*, 482 U.S. at 90; *see* Oliver v. Scott, 276 F.3d 736, 746 (5th Cir. 2002) (holding that ending cross-sex surveillance in bathrooms and showers would have "ripple effect" of reassignment of staff, with cost to security and gender equity of staff); Mayweathers v. Newland, 258 F.3d 930, 938 (9th Cir. 2001) (holding that absence of Muslims from work assignments for Jumu'ah services had no "ripple effect"; they were just marked absent but not penalized).

[189] *Turner*, 482 U.S. at 90-91. *Compare* Williams v. Morton, 343 F.3d 212, 217-18 (3d Cir. 2002) (holding that there was no *de minimis* cost alternative where providing 225 Muslims with Halal food would cost $280 a year apiece, compared with $3650 a year per person for kosher food for a smaller number of observant Jews) *with* Beerheide v. Suthers, 286 F.3d 1179, 1189 (10th Cir. 2002) (holding that $13,000 a year–0.158% of an $8.25 million budget–for kosher food for Jewish prisoners had *de minimis* impact on the overall prison food budget); *see* Nasir v. Morgan, 350 F.3d 366, 373 (3d Cir. 2003) (holding there was no easy, obvious alternative to banning correspondence with former prisoners; prison staff would have to read the mail); Hammons v. Saffle, 348 F.3d 1250, 1257 (10th Cir. 2003) (holding there was no *de minimis* cost alternative to prohibiting possession of Muslim oils in cells; the lack of incident under the former permissive policy did not establish that

B. Scope of the standard

The *Turner* reasonableness standard applies to all claims that a prison regulation infringes on constitutional rights.[190] By that statement the Court means the substantive rights protected by the Bill of Rights and the Due Process Clause, but not Eighth Amendment or procedural due process rights, which are governed by different standards.[191] It applies to informal policies and

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nothing bad would happen in the future); Morrison v. Hall, 261 F.3d 896, 895 (9th Cir. 2001) (holding that the easy, obvious alternative to banning third and fourth class mail because of a concern for "junk mail" is to distinguish between junk mail and magazine subscriptions); Hakim v. Hicks, 223 F.3d 1244 (11th Cir. 2000) (holding that adding religious names to ID cards was a *de minimis* cost alternative); Onishea v. Hopper, 171 F.3d 1289, 1301 (11th Cir. 1999) (en banc) (holding that excluding potentially violent prisoners rather than HIV-positive prisoners from programs was not an "easy alternative"), *cert. denied*, 528 U.S. 1114 (2000); Giano v. Senkowski, 54 F.3d 1050, 1056 (2d Cir. 1995) (holding there are no obvious, easy alternatives to a ban on nude or semi-nude photos of loved ones because imposing them would disregard prison officials' judgment and they would require "difficult line-drawing"); Covino v. Patrissi, 967 F.2d 73 (2d Cir. 1992) (holding that strip searches on reasonable suspicion were not an easy, obvious alternative because foregoing random searches would affect security); Benjamin v. Coughlin, 905 F.2d 571, 576-77 (2d Cir. 1990) (holding that a requirement of intake haircuts for Rastafarians for purposes of ID photos was unconstitutional because taking the photo with the hair held back was a nearly costless alternative).

A particularly extreme weighing of costs and alternatives appears in *Kimberlin v. U.S. Dep't of Justice*, 318 F.3d 228 (D.C.Cir.), *rehearing denied*, 351 F.3d 1166 (D.C.Cir. 2003), in which a statute barring prisoners' use or possession of electrical musical instruments was held justified under the first three *Turner* factors–and by implication the fourth–by the costs of electricity, storage, upkeep and supervision.

[190] Washington v. Harper, 494 U.S. 210, 223-24 (1990).

[191] *See* Washington v. Harper, 494 U.S. 210 (1990) (applying *Turner* reasonableness standard to substantive due process claim, *Mathews v. Eldridge* due process standard to procedural claim); § I.A-B, above (describing Eighth Amendment standards).

The Second Circuit has recently questioned whether the *Turner* standard applies to "a claim of constitutional protection *from* state action such as a strip search," noting that *Turner* and its Supreme Court progeny concerned prisoners' assertion of affirmative rights to correspond, marry, organize a union and order books. N.G. v. State, 382 F.3d 225, 235-36 (2d Cir. 2004). *Washington v. Harper*, in which the *Turner* standard was applied to the right to refuse the involuntary administration of psychotropic medications, would appear to involve "a claim of constitutional protection *from* state action" of an intrusive character.

individualized actions as well as regulations.[192] It may apply to some statutory claims.[193] It does not apply to claims pertaining to *outgoing* correspondence.[194]

At least one recent decision holds that certain rights are "fundamentally inconsistent" with incarceration, and the *Turner* analysis is not applicable in cases involving them.[195] This argument, which appears inconsistent with the Supreme Court's post-*Turner* decisions, was recently presented to the Supreme Court in *Overton v. Bazzetta* and was not accepted, though it was not conclusively ruled out either.[196] Another recent decision initially held that *Turner* was inapplicable to a statutory prohibition on prisoners' use or possession of electric musical instruments because these instruments impose costs, *e.g.*, the electricity to operate them, and government need not subsidize First Amendment exercise. In the face of a vigorous dissent on this point, the panel agreed to rest its decision on its alternate *Turner* analysis instead.[197]

C. Application of the standard

The *Turner* reasonableness standard is intended to be a "one size fits all" analysis for all prisoners' civil liberties claims.[198] Its application has mostly been *ad hoc* with little effort to systematize its method, leaving significant questions unanswered. The Supreme Court's most recent application of that standard is highly uncritical and deferential,[199] in contrast to the

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[192] Ford v. McGinnis, 352 F.3d 582, 595 n.15 (2d Cir. 2003); Cornwell v. Dahlberg, 963 F.2d 912, 917 (6th Cir. 1992); Frazier v. DuBois, 922 F.2d 560, 562 (10th Cir. 1990).

[193] *See* § I.E.13, above.

[194] Thornburgh v. Abbott, 490 U.S. 401, 413 (1989).

[195] Gerber v. Hickman, 291 F.3d 617, 620 (9th Cir. 2002) (en banc).

[196] Overton v. Bazzetta, 539 U.S. 126, 131-32 (2003).

[197] Kimberlin v. U.S. Dep't of Justice, 318 F.3d 228, 232-33 (D.C.Cir.), *rehearing denied*, 351 F.3d 1166 (D.C.Cir. 2003); *see id.*, 318 F.3d at 237-38 (concurring and dissenting opinion).

[198] Shaw v. Murphy, 532 U.S. 223, 229 (2001) (describing it as "a unitary, deferential standard"; eschewing "special protection to particular kinds of speech based on content").

[199] *See* Overton v. Bazzetta, 539 U.S. 126 (2003) (upholding various restrictions on prison visiting). *Overton* should be read in conjunction with the lower courts' opinions, which reflect a thorough critique of the logic and necessity of the rules based on a fully developed record, little of which is acknowledged by the Supreme Court.

approach of some earlier cases,[200] without methodological elaboration. The lower courts have differed with each other, and sometimes with themselves,[201] over whether prison officials must provide evidence or merely assertion in support of their positions, though most have held that defendants have an evidentiary burden.[202] The Ninth Circuit has held that prison officials initially need only assert a "common sense connection" between policy and challenged practice; if plaintiffs fail to refute that connection, it is sufficient if prison officials reasonably could have thought the policy would advance legitimate penological interests; if plaintiffs do refute the common-sense connection, prison officials must then "demonstrate that the relationship is not so

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[200] *See* Turner v. Safley, 482 U.S. 78, 94-99 (1987) (striking down prohibition on marriage as an "exaggerated response" to security concerns and as resting on "excessive paternalism"); *see also* Thornburgh v. Abbott, 490 U.S. 401, 414 (1989) (stating the standard is not "toothless").

[201] *Compare* Morrison v. Garraghty, 239 F.3d 648 (4th Cir. 2001) (affirming district court's entry of relief in part because defendants failed to substantiate their argument that their policy promoted security) *with* Veney v. Wyche, 293 F.3d 726 (4th Cir. 2002) (affirming under *Turner* the district court's dismissal on initial screening, with no response from defendants, of a challenge to a policy that on appeal prison officials *denied existed*).

[202] *See* Beerheide v. Suthers, 286 F.3d 1179, 1189 (10th Cir. 2002) ("In order to warrant deference, prison officials must present credible evidence to support their stated penological goals."); Armstrong v. Davis, 275 F.3d 849, 874 (9th Cir. 2001) (rejecting argument that defendants who failed to justify policies in the district court could do so with arguments developed later); Davis v. Norris, 249 F.3d 800 (8th Cir. 2001) (holding court cannot apply *Turner* standard where defendants did not submit evidence supporting their argument); Flagner v. Wilkinson, 241 F.3d 475, 486 (6th Cir. 2001) (holding that defendants were not entitled to summary judgment on an as-applied challenge to a religious restriction without evidence supporting their arguments that related to the individual plaintiff); Shimer v. Washington, 100 F.3d 506, 510 (7th Cir. 1996) (requiring evidence and not mere assertion); Salahuddin v. Coughlin, 993 F.2d 306 (2d Cir. 1993) (rejecting conclusory justifications for denying congregate religious services in newly opened prison where construction had not been completed); *see also* Ford v. McGinnis, 352 F.3d 582, 595-97 (2d Cir. 2003) (declining to consider *Turner* factors for the first time on appeal, remanding for development of an appropriate record); Nicholas v. Miller, 189 F.3d 191 (2d Cir. 1999) (per curiam) (finding material factual disputes concerning prison's denial of a request to form a Prisoners' Legal Defense Center, despite conclusory claims that permitting it would undermine safety and security). *But see* Fraise v. Terhune, 283 F.3d 506, 518 (3d Cir. 2002) (holding an anecdotal report about security threats is sufficient basis to support draconian security measures); Giano v. Senkowski, 54 F.3d 1050, 1055 (2d Cir. 1995) (upholding prohibition on sexually explicit photographs of prisoners' wives and girlfriends even though commercially produced materials were permitted, based on "common sense"; "Prison officials must be given latitude to anticipate the probable consequences of certain speech. . . ."); *compare id.* at 1057-62 (dissenting opinion) (criticizing majority's reliance on prison officials' unsubstantiated assertions).

'remote as to render the policy arbitrary or irrational.'"[203] Courts have also differed over the degree of critical scrutiny to be applied to the logic and consistency of those positions.[204] The Eleventh Circuit, like most others, has applied the standard in a mostly *ad hoc* fashion without generalizing about its application,[205] except to hold, in effect, that prison rules are to be assessed on their face and not as applied to particular prisoners.[206]

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[203] Prison Legal News v. Cook, 238 F.3d 1145, 1150 (9th Cir. 2001); *accord*, Wolf v. Ashcroft, 297 F.3d 305, 308-09 (3d Cir. 2002). That rule is presently before the Supreme Court in *Johnson v. California*, 321 F.3d 791, 801-02 (9th Cir. 2003), *cert. granted*, 124 S.Ct. 1505 (2004).

[204] *See* California First Amendment Coalition v. Woodford, 299 F.3d 868, 879 (9th Cir. 2002) (emphasizing the "exaggerated response" component of the *Turner* standard, noting that some governmental interests require "a closer fit between the regulation and the purpose it serves"); Beerheide v. Suthers, 286 F.3d 1179, 1186-92 (10th Cir. 2002) (closely examining prison officials' justifications for failure to provide a kosher diet); Hakim v. Hicks, 223 F.3d 1244, 1248-49 (11th Cir. 2000) (affirming rejection of officials' claim that adding religious names to ID cards would undermine order and security); Allen v. Coughlin, 64 F.3d 77 (2d Cir. 1995) (rejecting justification for a ban on clippings enclosed in correspondence, since prisoners were allowed to receive entire newspapers; noting that subscriptions and inter-library loan were not shown to be adequate alternatives); Bradley v. Hall, 64 F.3d 1276, 1280 (9th Cir. 1995) ("[D]eference does not mean abdication.") *Compare* Morrison v. Garraghty, 239 F.3d 648, 661 (4th Cir. 2001) (rejecting defendants' argument that certain religious items sought by plaintiff could be dangerous, since other inmates were allowed them) *with* Hammons v. Saffle, 348 F.3d 1250, 1255 (10th Cir. 2003) (upholding ban on personal possession of Muslim oils, but not other oils, because government "can, in some circumstances, implement policies that are logical but yet experiment with solutions and address problems one step at a time").

[205] *See* Hakim v. Hicks, 223 F.3d 1244 (11th Cir. 2000) (affirming district court direction to add prisoners' religious names to ID cards); Pope v. Hightower, 101 F.3d 1382 (11th Cir. 1996) (upholding "telephone list" limit of ten people as applied to a prisoner whose family lived in a distant state); Harris v. Thigpen, 941 F.2d 1495, 1512-20 (11th Cir. 1991) (upholding segregation of HIV-positive prisoners); *see* Onishea v. Hopper, 171 F.3d 1289, 1301 (11th Cir. 1999) (en banc) (considering *Turner* factors under Americans with Disabilities Act in upholding segregation of HIV-positive prisoners), *cert. denied*, 528 U.S. 1114 (2000).

[206] Pope v. Hightower, 101 F.3d at 1384-85 (disapproving district court's inquiry into whether a telephone rule generally valid under *Turner* was constitutional as applied to a prisoner whose family was in a distant state and who therefore relied more on the telephone for family contact than other prisoners). *Contra*, Flagner v. Wilkinson, 241 F.3d 475, 486 (6th Cir. 2001) (holding that prison officials must support restrictions on religious practice with evidence supporting their application to the individual plaintiff).

D. Particular civil liberties issues

1. Correspondence

Prisoners' "right to the free flow of incoming and outgoing mail is protected by the First Amendment."[207] Legal mail is entitled to greater protection than non-legal mail; it generally may not be read without a warrant,[208] and prisoners have the right to be present when it is opened and inspected for contraband.[209] Isolated incidents of mail tampering generally do not establish a constitutional violation.[210] Prison authorities have authority to prohibit or restrict inmate-inmate correspondence.[211] Reasonable restrictions on postage for indigents for non-legal correspondence are upheld.[212]

2. Reading

Prisoners' right to read may be restricted under the *Turner* reasonableness standard,[213]

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[207] Davis v. Goord, 320 F.3d 346, 351 (2d Cir. 2003).

[208] Sallier v. Brooks, 343 F.3d 868, 873-74 (6th Cir. 2003); Guajardo v. Estelle, 580 F.2d 748, 759 (5th Cir. 1978).

[209] Wolff v. McDonnell, 418 U.S. 539, 577 (1974); Davis v. Goord, 320 F.3d at 351; *see* Davidson v. Scully, 694 F.2d 50, 53 (2d Cir. 1982) (defining category of privileged mail).

[210] Davis v. Goord, 320 F.3d at 351.

[211] Turner v. Safley, 482 U.S. 78, 91-93 (1987); Purnell v. Lord, 952 F.2d 679 (2d Cir. 1992).

[212] Davidson v. Mann, 129 F.3d 700 (2d Cir. 2002); Van Poyck v. Singletary, 106 F.3d 1558, 1559-60 (11th Cir.) (upholding a limit on free materials and postage to one first-class letter per month, upholding limits on receipt of stamps from outside prison; stating indigents have no constitutional right to free postage for non-legal mail), *cert. denied*, 522 U.S. 856 (1997); Gittens v. Sullivan, 848 F.3d 389 (2d Cir. 1988).

[213] Thornburgh v. Abbott, 490 U.S. 401, 404-05, 414-19 (1989) (upholding regulation permitting censorship of any publication "determined detrimental to the security, good order, or discipline of the institution or if it might facilitate criminal activity" but barring censorship "solely because [the publication's] content is religious, philosophical, political, social or sexual, or because its content is unpopular or repugnant."); *accord*, Bahrampour v. Lampert, 356 F.3d 969 (9th Cir. 2004) (upholding censorship of *Muscle Elegance* magazine under regulation restricting sexually explicit materials and *White Dwarf* under regulation restricting "role-playing or similar fantasy games or materials"); Mauro v. Arpaio, 188 F.3d 1054 (9th Cir. 1999) (en banc), *cert. denied*, 529 U.S. 1019 (2000) (upholding restriction on sexually explicit but non-obscene materials); Lyon v. Grossheim, 803 F.Supp. 1538, 1549 (S.D.Iowa 1992) (upholding a regulation excluding material that

though much prison censorship has been struck down as overbroad.[214] Prison censors must observe procedural safeguards.[215] There must be "individualized" decisions about particular publications at the time of censorship and not just an "excluded list" of publications.[216] The sender of literature, as well as the recipient, should receive notice and an opportunity to be heard.[217]

Non-content-based restrictions on reading material, such as variations on the "publisher only" rule, will be upheld if reasonable.[218] Courts have struck down prohibitions on

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is "likely to be disruptive or produce violence").

[214] *See, e.g.,* Cline v. Fox, 319 F.Supp.2d 685 (N.D.W.Va. 2004) (striking down policy under which officials censored *Sophie's Choice, Myra Breckinridge,* and works by John Updike).

[215] Krug v. Lutz, 329 F.3d 692, 696-97 and n.4 (9th Cir. 2003) (holding due process for rejection of correspondence extends to receipt of publications; appeal to someone other than the censor is a due process requirement); Frost v. Symington, 197 F.3d 348 (9th Cir. 1999) (holding notice of withholding of publication required); Murphy v. Missouri Dept. of Corrections, 814 F.2d at 1258; Hopkins v. Collins, 548 F.2d 503, 504 (4th Cir. 1977).

[216] Williams v. Brimeyer, 116 F.3d 351 (8th Cir. 1997); Murphy v. Missouri Dept. of Corrections, 814 F.2d 1252, 1257-58 (8th Cir. 1987) (holding Aryan Nations publications must be reviewed individually); *see* Thornburgh v. Abbott, 490 U.S. at 416-17 (relying heavily on the existence of this protection in upholding the censorship regulation); Shakur v. Selsky, 391 F.3d 106, 115 (2d Cir. 2004) (holding that a rule banning all publications of "unauthorized organizations" appeared to lack a reasonable relationship to legitimate interests). *Cf.* Owen v. Wille, 117 F.3d 1235, 1237-38 (11th Cir. 1997) (noting defendants did not dispute that a blanket ban on publications with nude photos would be unconstitutional, upholding exclusion of publications after individualized review), *cert. denied,* 522 U.S. 1126 (1998).

[217] Montcalm Publishing Co. v. Beck, 80 F.3d 105, 109 (4th Cir. 1996); Lawson v. Dugger, 840 F.2d 781, 786 (11th Cir. 1987), *rehearing denied,* 840 F.2d 779 (11th Cir. 1988), *vacated and remanded on other grounds,* 490 U.S. 1078 (1989).

[218] Bell v. Wolfish, 441 U.S. 520, 550-52 (1979) (detainee case). *But see* Keenan v. Hall, 83 F.3d 1083, 1093 (9th Cir. 1996) (holding publisher only rule may be unconstitutional where it combines with other circumstances to impose severe limits on availability of reading material); Allen v. Coughlin, 64 F.3d 77 (2d Cir. 1995) (denying summary judgment to prison officials who maintained a publisher only rule for newspapers and prohibited enclosure of newspaper clippings in correspondence); *see also* Ashker v. California Dep't of Corrections, 350 F.3d 917, 923-24 (9th Cir. 2003) (striking down requirement of "approved vendor" labels which added nothing to security and obstructed receipt of reading material); Sorrels v. McKee, 290 F.3d 965, 970 (9th Cir. 2002) (striking down prohibition on receipt of publications as gifts); Morrison v. Hall, 261 F.3d 896 (9th Cir. 2001)

newspapers.[219] Prison officials may restrict reading material in punitive segregation, although most cases upholding this practice have involved short periods of time.[220]

The right to read religious literature would appear to be governed by a more favorable legal standard under the Religious Land Use and Institutionalized Persons Act.[221] However, some cases involving religious literature have addressed broad categories of material rather than reviewing the content of each challenged item,[222] incorrectly in my view.

3. Complaining

Prison officials may ban or restrict prisoner organizations that oppose or criticize prison policies in any organized fashion.[223] Courts have also upheld restrictions on informal or social

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(striking down prohibition on publications sent third or fourth class).

[219] Green v. Ferrell, 801 F.2d 765, 772 (5th Cir. 1986); Mann v. Smith, 796 F.2d 79, 82-83 (5th Cir. 1986) (ban on all newspapers and magazines violated First Amendment).

[220] Gregory v. Auger, 768 F.2d 287, 289-91 (8th Cir.) (inmates in disciplinary detention could be deprived of all but first class mail of a "personal, legal or religious" nature where detention was limited to 60 days), *cert. denied*, 474 U.S. 1035 (1985); Daigre v. Maggio, 719 F.2d 1310, 1312-13 (5th Cir. 1983) (ban on newspapers and magazines in segregation upheld as applied to an inmate who served ten days); Pendleton v. Housewright, 651 F.Supp. 631, 635 (D.Nev. 1986) (denial of reading materials upheld when limited to a few days at a time).

[221] 42 U.S.C. § 2000cc-1; *see* Lawson v. Dugger, 844 F.Supp. 1538 (S.D.Fla. 1994) (so holding under the Religious Freedom Restoration Act).

[222] *See* Fraise v. Terhune, 283 F.3d 506 (3d Cir. 2002) (affirming ban on Five Percenter literature in connection with treatment of Five Percenters as a "security risk group"). *Contra*, Marria v. Broaddus, 2003 WL 21782633 (S.D.N.Y., July 31, 2003), *relief entered*, 2004 WL 1724984 (S.D.N.Y., July 30, 2004).

[223] Jones v. North Carolina Prisoners' Labor Union, Inc., 433 U.S. 119 (1977); Akbar v. Borgen, 803 F.Supp. 1479, 1485-86 (E.D.Wis. 1992) (upholding a rule forbidding "unsanctioned group activity" on its face and as applied to a prisoner seeking to form a Muslim organization); Hudson v. Thornburgh, 770 F.Supp. 1030, 1036 (W.D. Pa. 1991) (disbanding of Association of Lifers upheld because prison officials believed it was a security threat), *aff'd*, 980 F.2d 723 (3d Cir. 1992); Thomas v. U.S. Secretary of Defense, 730 F.Supp. 362, 366 (D.Kan. 1990) (white inmates could be denied the right to form a "European Heritage Club"). *But see* Nicholas v. Miller, 189 F.3d 191 (2d Cir. 1999) (per curiam) (holding prison officials were not entitled to summary judgment after prohibiting formation of Prisoners' Legal Defense Center).

association by prisoners.[224] Courts have differed over the constitutional status of petitions.[225]

Grievances filed through an official grievance procedure are constitutionally protected,[226] as are criticisms made in outgoing letters,[227] communication with official agencies,[228] orderly participation in forums designed for prisoners to express their views,[229] complaints addressed directly to prison officials,[230] and other activities that do not threaten security.[231] Communications may not be protected if they involve direct confrontation with prison

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[224] Burnette v. Phelps, 621 F.Supp. 1157, 1159-60 (M.D.La. 1985) (rule against speaking in dining hall did not violate First Amendment); Dooley v. Quick, 598 F.Supp. 607, 612 (D.R.I. 1984) (as long as there is some opportunity for human contact, "decisions about how and when inmates may see and/or contact other inmates" are up to prison officials), *aff'd*, 787 F.2d 579 (1st Cir. 1986); State ex rel. Whiting v. Kolb, 158 Wis.2d 226, 461 N.W.2d 816, 820-21 (Wis.App. 1990) (ban on "ritualistic greetings" including embracing and kissing upheld as a means of prohibiting "gang symbolism").

[225] *See* Duamutef v. O'Keefe, 98 F.3d 22, 24 (2d Cir. 1996) (holding petitions may be prohibited). *But see, e.g.*, Bridges v. Russell, 757 F.2d 1155, 1156-57 (11th Cir. 1985) (allegation of transfer in retaliation for a petition stated a claim). Their status may depend on whether prison officials have, in fact, enacted a rule prohibiting them. *See* Gayle v. Gonyea, 313 F.3d 677, 680 n.3 (2d Cir. 2002) (questioning whether prison rule gave notice that petitions were forbidden).

[226] Gayle v. Gonyea, 313 F.3d 677, 682 (2d Cir. 2002).

[227] Procunier v. Martinez, 416 U.S. 396, 413-16 (1974).

[228] Brown v. Crowley, 312 F.3d 782, 789-91 (6th Cir. 2002) (complaint to state police); Meriwether v. Coughlin, 879 F.2d 1037, 1046 (2d Cir. 1989) (correspondence with state officials and public interest organizations); Franco v. Kelly, 854 F.2d 584, 589-90 (2d Cir. 1988) (cooperation with Inspector General investigating staff misconduct).

[229] *See* Meriwether v. Coughlin, 879 F.2d at 1046 (meetings with Superintendent to discuss problems in prison).

[230] Newsom v. Morris, 888 F.2d 371, 375-77 (6th Cir. 1989) (inmate disciplinary assistants who lost their jobs for complaining to the warden about the disciplinary board chairman were entitled to reinstatement); Ustrak v. Fairman, 781 F.2d 573, 577-78 (7th Cir.) (denial of transfer because of letters to warden was unconstitutional), *cert. denied*, 479 U.S. 824 (1986); Salahuddin v. Harris, 684 F.Supp. 1224, 1226-27 (S.D.N.Y. 1988) (letter to Superintendent and other officials protesting the discipline of another inmate was constitutionally protected).

[231] Cain v. Lane, 857 F.2d 1139, 1143 (7th Cir. 1988) (discipline for trying to document inmate complaints about conditions stated a First Amendment claim).

personnel,[232] are disrespectful or abusive to or about staff,[233] or contain threats of unlawful or improper action.[234] A "threat" to take a constitutionally protected action is itself constitutionally protected.[235]

"The First Amendment forbids prison officials from retaliating against prisoners for exercising the right of free speech."[236] Such claims may be litigated by alleging and proving "a chronology of events from which retaliation may plausibly be inferred."[237]

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[232] *See, e.g.*, Garrido v. Coughlin, 716 F.Supp. 98, 101 (S.D.N.Y. 1989) ("verbal confrontation" of officers over their treatment of another inmate); Pollard v. Baskerville, 481 F.Supp. 1157, 1160 (E.D.Va. 1979) (accusation that a guard brought in contraband), *aff'd*, 620 F.2d 294 (4th Cir. 1980); Riggs v. Miller, 480 F.Supp. 799, 804 (E.D.Va. 1979) ("bickering, argumentative conversation"); Craig v. Franke, 478 F.Supp. 19, 21 (E.D.Wis. 1979) (accusation that an officer was drunk); Durkin v. Taylor, 444 F.Supp. 879, 881-83 (E.D.Va. 1979) (statement that "I am tired of chickenshit rules").

[233] Gibbs v. King, 779 F.2d 1040, 1045-46 (5th Cir.), *cert. denied*, 476 U.S. 1117 (1986); *accord*, Ustrak v. Fairman, 781 F.2d at 580 (upholding regulation forbidding "being disrespectful" or verbally abusing employees); Savage v. Snow, 575 F.Supp. 828, 836 (S.D.N.Y. 1983) (prisoner could be disciplined for addressing an officer in an "abusive" manner).

[234] Jones v. State, 447 N.W.2d 556, 557-58 (Iowa App. 1989) (obscenities about prison staff and threat to "get even" could be punished); Nieves v. Coughlin, 157 A.D.2d 945, 550 N.Y.S.2d 205, 206 (N.Y.App.Div. 1990) (statement "I'll do a year in the box and then come out strong on you" could be punished under rule against threats).

[235] *See* Cavey v. Levine, 435 F.Supp. 475, 481-83 (D.Md. 1977) (prisoner could not be punished for threats to write to the press about an inmate suicide), *aff'd sub nom.* Cavey v. Williams, 580 F.2d 1047 (4th Cir. 1978); *see also* Hargis v. Foster, 312 F.3d 404 (9th Cir. 2002) (holding that a disciplinary conviction for "coercion" for mentioning pending litigation to an officer presented a jury question as to reasonableness).

[236] Farrow v. West, 320 F.3d 1235, 1248-49 (11th Cir. 2003) (rejecting this plaintiff's claim absent evidence that the defendants knew of the plaintiff's protected activity); *accord*, Davis v. Goord, 320 F.3d 346, 352 (2d Cir. 2003) (holding a First Amendment claim is stated by allegations "(1) that the speech or conduct at issue was protected, (2) that the defendant took adverse action against the plaintiff, and (3) that there was a causal connection between the protected speech and the adverse action.") (citation omitted); Mitchell v. Farcass, 112 F.3d 1483, 1485, 1490 (11th Cir. 1997) (holding allegation that plaintiff was placed in segregation after complaining to the NAACP stated a claim); Wildberger v. Bracknell, 869 F.2d 1467, 1468 (11th Cir. 1989) (same re filing a grievance). Retaliation claims are discussed in more detail below at § IV.A.3.

[237] Cain v. Lane, 857 F.2d 1139, 1143 n. 6 (7th Cir. 1988); *see* Gayle v. Gonyea, 313 F.3d 677, 683 (2d Cir. 2002) (holding "temporal proximity" of alleged retaliation to grievance supported a

4. Communication with the media.

Prisoners "have a First Amendment right to be free from governmental interference with their contacts with the press if that interference is based on the content of their speech or proposed speech."[238] However, prison officials have substantial discretion over how press contacts are made as long as they leave open adequate alternatives. Thus, they may ban interviews of prisoners by media representatives as long as prisoners are free to write letters to the press or communicate via their other visitors.[239] In general, the press has no more right to enter jails or prisons than does the general public.[240]

Prison officials may not restrict prisoners' right to write letters to the press or to write for publication unless they have substantial reasons,[241] and may not retaliate for such activity.[242]

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retaliation claim).

[238] Kimberlin v. Quinlan, 774 F.Supp. 1, 3-4 (D.D.C. 1991); *accord*, Abu-Jamal v. Price, 154 F.3d 128, 135-36 (3d Cir. 1998).

[239] Pell v. Procunier, 417 U.S. 817, 822-28 (1974); *see* Houchins v. KQED, Inc., 438 U.S. 1 (1978) (reversing an injunction granting television station access to jail; no majority opinion). *But see* Mujahid v. Sumner, 807 F.Supp. 1505, 1509-11 (D.Haw. 1992) (rule barring both visits and correspondence with members of the press was unconstitutional), *aff'd*, 996 F.2d 1226 (9th Cir. 1993).

[240] Pell v. Procunier, 417 U.S. at 834; Saxbe v. Washington Post Co., 417 U.S. 843, 849-50 (1974).

[241] Abu-Jamal v. Price, 154 F.3d 128, 136 (3d Cir. 1998) (enjoining application of rule against engaging in a business or profession to prisoner's writing for publication); Owen v. Lash, 682 F.2d 648, 650-53 (7th Cir. 1982) (ban on correspondence with newspaper reporter was unconstitutional); Mujahid v. Sumner, 807 F.Supp. 1505, 1509-11 (D.Haw. 1992) (ban on correspondence with members of the press unless they had been friends before the prisoner was incarcerated was unconstitutional), *aff'd*, 996 F.2d 1226 (9th Cir. 1993); Martyr v. Mazur-Hart, 789 F.Supp. 1081, 1089 (D.Or. 1992) (enjoining interference with a mental patient's letters to the media); Tyler v. Ciccone, 299 F.Supp. 684, 688 (W.D.Mo. 1969) (restrictions on detainee's preparation of manuscripts struck down). *But see* Martin v. Rison, 741 F.Supp. 1406, 1410-18 (N.D.Cal. 1990) (upholding prison regulations forbidding prisoners to write for payment, act as reporters or publish under a byline in the news media, but permitting them to write letters), *vacated as moot sub nom.* Chronicle Publishing Co. v. Rison, 962 F.2d 959 (9th Cir. 1992), *cert. denied*, 507 U.S. 984 (1993).

[242] Spruytte v. Hoffner, 181 F.Supp.2d 736, 742 (W.D.Mich. 2001) (awarding damages to plaintiffs' subjected to retaliation for letter to newspaper); Kimberlin v. Quinlan, 774 F.Supp. 1, 4 n. 6 (D.D.C. 1991) and cases cited; Cavey v. Levine, 435 F.Supp. at 483; *see also* Pratt v. Rowland,

Involuntary media exposure may violate the Constitution.[243]

5. Visiting

The Supreme Court has recently upheld a wide variety of severe restrictions on prison visiting, though it declined to hold that recognition of a constitutional right to visit was inconsistent with incarceration.[244] It has also held that there is no due process right to procedural protections when visiting is suspended unless state law creates a liberty interest,[245] and that qualification is of debatable validity in light of the Court's subsequent prison due process jurisprudence.[246]

6. Telephones

Prisoners have been held to have a First Amendment right to telephone access subject to reasonable limitations.[247] I am not aware of cases holding limitations unreasonable for convicted prisoners,[248] though there are such decisions for pre-trial detainees, reflecting the fact that jail conditions are often more restrictive than prison conditions, and the fact that persons awaiting trial generally have greater need for telephone access.[249] Severe restrictions on telephone use

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770 F.Supp. 1399, 1406 (N.D.Cal. 1991) (defendants enjoined from threatening, harassing or punishing the plaintiff because of his media attention).

[243] Lauro v. Charles, 219 F.3d 202 (2d Cir. 2000) (holding "perp walk" violated the Fourth Amendment).

[244] Overton v. Bazzetta, 539 U.S. 126 (2003).

[245] Kentucky Dep't of Corrections v. Thompson, 490 U.S. 454, 460-61 (1989).

[246] *See* Sandin v. Conner, 515 U.S. 472 (1995).

[247] Johnson v. State of California, 207 F.3d 650, 656 (9th Cir. 2000); Washington v. Reno, 35 F.3d 1093, 1100-01 (6th Cir. 1994).

[248] *See, e.g.*, Pope v. Hightower, 101 F.3d 1382, 1384-85 (11th Cir. 1996) (upholding rule limiting prisoners to ten persons on an authorized calling list, with the option of changing the list every six months, as reasonably related to curtailing criminal activity and the harassment of judges and jurors).

[249] Keenan v. Hall, 83 F.3d 1083, 1092 (9th Cir. 1996); Johnson-El v. Schoemehl, 878 F.2d 1043, 1052-53 (8th Cir. 1989); Johnson by Johnson v. Brelje, 701 F.2d 1201, 1207-08 (7th Cir. 1983); *see* Carlo v. City of Chino, 105 F.3d 493 (9th Cir. 1997) (holding that arrestees are constitutionally entitled to telephone access because being held incommunicado is a substantial deprivation of liberty).

have been upheld for particular prisoners to protect the safety of witnesses and prevent further criminal activity.[250] Surveillance of prisoners' telephone conversations usually does not violate the Omnibus Crime Control and Safe Streets Act, either because the prisoners have given implied consent to monitoring by using telephones that they have been warned are monitored,[251] or because the monitoring falls under the statute's exception for interception "by an investigative or law enforcement officer in the ordinary course of his duties. . . ."[252] Such surveillance generally does not violate the Fourth Amendment either.[253] To date, prisoners and their families have failed to find a legal handle on the exorbitant rates charged by some prison long-distance carriers, with kickbacks to the prison system.[254]

7. Voting

Convicted felons may be disenfranchised,[255] and usually are while they are incarcerated. Pre-trial detainees and misdemeanants are generally eligible to vote, and must be provided a means to do so, usually absentee ballots.[256] Challenges to felon disenfranchisement are presently under *en banc* consideration in both the Second and Eleventh Circuits.[257]

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[250] United States v. El-Hage, 213 F.3d 74 (2d Cir. 2000).

[251] *See, e.g.*, U.S. v. Willoughby, 860 F.2d 15, 19-20 (2d Cir. 1988), *cert. denied*, 488 U.S. 1033 (1989).

[252] *See, e.g.*, U.S. v. Friedman, 300 F.3d 111, 122-23 (2d Cir. 2002), *cert. denied*, 538 U.S. 981 (2003).

[253] *See Friedman*, 300 F.3d at 123 (holding notice of telephone surveillance meant the prisoner had no expectation of privacy in his calls) *Willoughby*, 860 F.2d at 21 (holding surveillance of detainees' calls not unreasonable under law governing pre-trial detainees' rights).

[254] *See* Arsberry v. Illinois, 244 F.3d 558 (7th Cir. 2001); Johnson v. State of California, 207 F.3d 650 (9th Cir. 2000) (holding high rates do not infringe the First Amendment unless they deny telephone access altogether).

[255] Richardson v. Ramirez, 418 U.S. 24, 55-56 (1974).

[256] O'Brien v. Skinner, 414 U.S. 524, 530-31, 533 n.2 (1974).

[257] *See* Muntaqim v. Coombe, 366 F.3d 102 (2d Cir.), *order amended and rehearing en banc granted*, ___ F.3d ___ , 2004 WL 2998551 (Dec. 29, 2004) (presenting question whether disenfranchisement of prisoners and parolees states a claim of vote dilution under Voting Rights Act); Johnson v. Governor of State of Florida, 353 F.3d 1287 (11th Cir. 2003) (finding material issues of fact as to equal protection and Voting Rights Act claims), *rehearing en banc granted and opinion vacated*, 377 F.3d 1163 (11th Cir. 2004); *see also* Baker v. Pataki, 85 F.3d 919 (2d Cir. 1996) (en banc) (per curiam) (affirming district court dismissal by an equally divided court of Voting

8. Religious exercise

Prisoners are constitutionally entitled to the free exercise of religion subject to the reasonable relationship test of *Turner v. Safley*.[258] Prisoners' religious exercise is also protected by the Religious Land Use and Institutionalized Persons Act (RLUIPA), which requires state or local governments that accept federal funds for their correctional programs to justify substantial burdens on prisoners' religious exercise by showing that they are the least restrictive means of serving a compelling interest.[259] The same standard is imposed by the Religious Freedom Restoration Act (RFRA)[260] on the federal government, that statute having been struck down by the Supreme Court as applied to state governments.[261] There is presently a conflict among circuits as to the constitutionality of RLUIPA, and the question (part of it, anyway) is pending in the Supreme Court.[262] Because of the constitutional controversies about both statutes, there have been relatively few decisions on the merits under them, at least in prison cases.[263]

Rights Act claim, remanding constitutional claims for repleading).

[258] 482 U.S. 78 (1987); *see* O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987) (applying reasonable relationship standard to religious issue). *But see* McCorkle v. Johnson, 881 F.2d 993, 996 (11th Cir. 1989) (stating that Satanist practices, "*and the beliefs that encourage them*, cannot be tolerated in a prison environment since they pose security threats and are directly contrary to the goals of the institution"; denying plaintiff Satanic literature and medallion) (emphasis supplied).

Numerous free exercise cases are cited in § II.A-C, above, in connection with discussion of the *Turner* standard.

[259] 42 U.S.C. § 2000cc-1.

[260] 42 U.S.C. § 2000bb *et seq.*

[261] City of Boerne v. Flores, 521 U.S. 507 (1997); *see* O'Bryan v. Bureau of Prisons, 349 F.3d 399, 401 (7th Cir. 2003) (holding RFRA applicable to federal officers and agencies).

[262] *Compare* Cutter v. Wilkinson, 349 F.3d 257 (6th Cir. 2003) (holding RLUIPA to violate the Establishment Clause), *cert. granted*, 125 U.S. 308 (2004), *with* Benning v. Georgia, 391 F.3d 1299 (11th Cir. 2004) (upholding RLUIPA against arguments that it exceeds Congress's Spending Clause authority, violates the Tenth Amendment, and constitutes an establishment of religion); Charles v. Verhagen, 348 F.3d 601 (7th Cir. 2003) (upholding RLUIPA against Spending Clause and Establishment Clause attacks).

[263] In *Lawson v. Singletary*, 85 F.3d 502, 510 (11th Cir. 1996), the Eleventh Circuit held that the compelling interest test of RFRA is to be applied with regard to the "special circumstances" of prison security. The statute's intent, it said, was to restore pre-*O'Lone* law, which the court assumes is equivalent to the *Procunier v. Martinez* standard, which it construes as adapting the compelling interest/least restrictive standard to the prison setting. Prison security is a compelling interest. Using that analysis, the court upheld as applied to religious publications a rule censoring material that

The measure of a prisoner's (or anyone else's) religious rights is his or her sincerely held beliefs, and not the court's or prison authorities' view of what beliefs are valid or central to a particular belief system.[264] The question is open under the First Amendment whether plaintiffs must show a "substantial burden" on their religious rights in a free exercise case.[265] Assuming that they do, a practice need not be mandated by a plaintiff's religion for its restriction to constitute a substantial burden, though the question is certainly relevant to a substantial burden inquiry.[266] Substantial burden is a necessary element of claims under RLUIPA and RFRA, and the Eleventh Circuit has described, if not defined, that term as "akin to significant pressure which directly coerces the religious adherent to conform his or her behavior accordingly. Thus, a substantial burden can result from pressure that tends to force adherents to forego religious precepts or from pressure that mandates religious conduct."[267]

"depicts, describes, or encourages activities which may lead to the use of physical violence or group disruption" or "otherwise presents a threat to the security, order or rehabilitative objectives of the correctional system or the safety of any person." *See* Jolly v. Coughlin, 76 F.3d 468 (2d Cir. 1996) (holding that punishing a Rastafarian prisoner for refusing to take a tuberculosis test violated RFRA in light of available alternatives).

[264] Ford v. McGinnis, 352 F.3d 582, 590-91 (2d Cir. 2004); Martinelli v. Dugger, 817 F.2d 1499, 1504 (11th Cir. 1987) ("[T]he Supreme Court has admonished federal courts not to sit as arbiters of religious orthodoxy."), *cert. denied*, 484 U.S. 1012 (1988).

Some courts continue to resist this proposition. In *Goff v. Graves*, 362 F.3d 543, 547 (8th Cir. 2004), the court held that plaintiffs in a free exercise case must show that the practice allegedly infringed is based on a teaching of the religion, and reversed the district court because the practice was not "grounded" in the religion's "theology or its prescribed rituals." The court's view of that case may have been colored by the fact that it involved the Church of the New Song, or CONS, a religion that originated in prison and has been held to be a "masquerade" by other courts. *Id.* In any case, the holdings of *Ford*, *Martinelli*, and similar decisions are solidly based in Supreme Court precedent. *See* Thomas v. Review Bd. of Indiana Employment Sec. Div., 450 U.S. 707, 716 (1981) ("[I]t is not within the judicial function to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith. Courts are not arbiters of scriptural interpretation."), *quoted in Martinelli*, 817 F.2d at 1504.

[265] *Id.*, 352 F.3d at 593; *see* McEachern v. McGuinnis, 357 F.3d 197, 202-03 (2d Cir. 2003) (noting divergent views on substantial burden question).

[266] *Id.*

[267] Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1227 (11th Cir. 2004), *pet. for cert. filed*, No. 04-469, 73 U.S.Law Week 3238 (Oct. 1, 2004); *accord*, Jolly v. Coughlin, 76 F.3d 468, 477 (2d Cir.1996) (defining substantial burden under RFRA as a situation where "the state 'puts substantial pressure on an adherent to modify his behavior and to violate his beliefs.' "), *quoting* Thomas v. Review Bd. of the Indiana Employment Sec. Div., 450 U.S. 707, 718 (1981) (a First

There has been a large amount of highly fact-intensive litigation about prisoners' religious rights under the *Turner* reasonableness standard; the following subsections chiefly identify authority on several frequently litigated subjects.

a. Worship and ceremony

Prisoners have a constitutional right to participate in services, ceremonies, and celebrations of their religion,[268] subject to the restrictions of the reasonable relationship standard.[269] Blanket exclusion of segregated prisoners from congregate services is unlawful, but prisoners may be excluded based on case-by-case inquiry.[270]

b. Dress and appearance

Prisoners have a right to maintain dress and appearance required by their religious beliefs, subject to restrictions meeting the reasonable relationship standard.[271] Restrictions on hair length and facial hair, often struck down under pre-*Turner/O'Lone* law, have generally been upheld

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Amendment case).

[268] Ford v. McGinnis, *supra, passim*; Salahuddin v. Coughlin, 993 F.3d 306 (2d Cir. 1993) (holding conclusory allegation that officials could not accommodate services at a prison occupied while still under construction did not entitle them to summary judgment). *Cf.* Chatin v. Coombe, 186 F.3d 82 (2d Cir. 1999) (holding that a rule under which prisoners were disciplined for performing *rakat* (Muslim ritual prayer) in the prison yard was unconstitutionally vague as applied; not ruling on substantive restriction).

[269] O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987) (upholding prison officials' refusal to release prisoners from outside work assignments to return to the prison for Jumu'ah services); Benjamin v. Coughlin, 905 F.2d 571 (2d Cir. 1990) (upholding refusal to permit Rastafarian services absent an outside sponsor, given the danger that inmate-run services would be used for illicit activity or provoke conflict).

[270] Salahuddin v. Coughlin, 993 F.3d 306, 308 (2d Cir. 1993) (holding "keeplocked" prisoner did not lose right to attend services); Salahuddin v. Coughlin, 992 F.2d 447, 449 (2d Cir. 1993) (upholding exclusion of prisoner segregated for fighting).

[271] Benjamin v. Coughlin, 905 F.2d 571 (2d Cir. 1990) (holding requirement of intake haircut for Rastafarians unconstitutional because defendants could take an equally good photograph with hair pulled back; holding "crowns" could be forbidden, though kufis and yarmulkes were permitted, because they were larger and looser-fitting and presented greater danger of contraband).

under that standard.[272] The Eleventh Circuit, which generally upheld such restrictions under the pre-*Turner/O'Lone* law,[273] has also upheld them over religious objection under the least restrictive means standard of the Religious Freedom Restoration Act,[274] now applied under the Religious Land Use and Institutionalized Persons Act.

c. Diet

"[P]rison officials must provide a prisoner a diet that is consistent with his religious scruples."[275] In practice, the outcomes of religious diet controversies have varied widely.[276] The Eleventh Circuit appears not to have addressed such disputes recently, either in constitutional terms or under RFRA or RLUIPA.[277]

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[272] Fromer v. Scully, 874 F.2d 69 (2d Cir. 1989); *compare* Fromer v. Scully, 817 F.2d 227 (2d Cir. 1987) (striking rule down before *Turner v. Safley*).

[273] *See* Martinelli v. Dugger, 817 F.2d 1499, 1506 (11th Cir. 1987), *cert. denied*, 484 U.S. 1012 (1988); Brightly v. Wainwright, 814 F.2d 612, 613 (11th Cir.), *cert. denied*, 484 U.S. 944 (1987)..

[274] Harris v. Chapman, 97 F.3d 499 (11th Cir. 1996).

[275] Jackson v. Mann, 196 F.3d 316, 320 (2d Cir. 1999) (citations and internal quotation marks omitted). *But see* Benjamin v. Coughlin, 905 F.2d 571 (2d Cir. 1990) (holding denial of Rastafarian Ital diet was not unconstitutional since the diet varied among individuals and sects).

[276] *See, e.g.*, DeHart v. Horn, 390 F.3d 262 (3d Cir. 2004) (upholding denial of religious diet to Buddhist prisoner); Goff v. Graves, 362 F.3d 543, 549-50 (8th Cir. 2004) (upholding refusal to allow food trays prepared for religious banquet to be delivered to members in segregation unit, noting that members had sent contraband to unit before); Williams v. Morton, 343 F.3d 212 (3d Cir. 2002) (upholding denial of Halal diet to Muslims, even though kosher food was provided for Jews); Beerheide v. Suthers, 286 F.3d 1179 (10th Cir. 2002) (striking down denial of kosher diet for Jews); Love v. Reed, 216 F.3d 682 (8th Cir. 2000) (holding unconstitutional the refusal to provide food on Saturday for consumption on Sunday per the plaintiff's idiosyncratic "Hebrew" belief system); Makin v. Colorado Department of Correction, 183 F.3d 1205 (10th Cir. 1999) (holding failure to adjust meal schedule for Ramadan violated the First Amendment).

[277] *See* Martinelli v. Dugger, 817 F.2d 1499, 1507, 1508 (11th Cir. 1987) (holding failure to provide a full kosher diet was "rationally related to the goal of avoiding excessive administrative expense"; enjoining defendants to let the Greek Orthodox plaintiff eat in the pork-free line "when available"; decision antedates *Turner* and *O'Lone*), *cert. denied*, 484 U.S. 1012 (1988).

d. Names

Prisoners' right to use religious names is generally harmonized with prison officials' need for reliable identification and to keep their files manageable by allowing the use of both names.[278]

9. Establishment of religion

Requiring participation or penalizing non-participation in prison programs of a religious nature violates the Establishment Clause.[279] The exercise of non-religious authority by prison chaplains raises "significant constitutional questions" (never resolved, to my knowledge) under the Establishment Clause.[280] Whether and to what extent prisons' sponsorship of religious programs can violate the Establishment Clause absent an element of coercion appears to be an open question under current law.[281]

10. Searches and privacy

The Supreme Court has held that prisoners have no reasonable expectation of privacy in

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[278] *See* Hakim v. Hicks, 223 F.3d 1244 (11th Cir. 2000) (affirming order that prison officials add religious names to ID cards), *cert. denied*, 532 U.S. 932 (2001); Fawaad v. Jones, 81 F.3d 1084 (11th Cir. 1996) (requiring prisoner to use both names on correspondence upheld under RFRA); Malik v. Brown, 71 F.3d 724 (9th Cir. 1995) (allowing prisoner to use both names on outgoing mail held required under *Turner*).

[279] Kerr v. Farrey, 95 F.3d 472, 478-80 (7th Cir. 1996) (holding that a prisoner could not be required to participate in Narcotics Anonymous or have his security classification raised); Clanton v. Glover, 280 F.Supp.2d 1360, 1366 (M.D.Fla. 2003) (holding allegation that prison drug program required prayer ceremony supported an Establishment Clause claim); Griffin v. Coughlin, 88 N.Y.2d 674 (1996), *cert. denied*, 519 U.S. 1054 (1997) (holding that participation in family visiting program could not be conditioned on participation in Alcoholics Anonymous); *see also* Warner v. Orange County Dep't of Probation, 115 F.3d 1068 (2d Cir. 1997) (holding compelled attendance at Alcoholics Anonymous as a probation condition violated the Establishment Clause; county was required to make available a secular alternative).

[280] Theriault v. A Religious Office, 895 F.2d 104 (2d Cir. 1990).

[281] *Compare* Freedom from Religion Foundation, Inc. v. McCallum, 324 F.3d 880, 883-84 (7th Cir. 2003) (holding sponsorship of halfway house program operated by a religious institution did not violate the Establishment Clause since prisoners could freely choose secular alternatives, even if they weren't as good as the religious one) *with* DeStefano v. Emergency Housing Group, Inc., 247 F.3d 397 (2d Cir. 2001) (holding that inclusion of Alcoholics Anonymous among services offered by a state-funded facility did not violate the Establishment Clause, but the participation of staff members in religious indoctrination would).

their living quarters and the Fourth Amendment does not protect against them, however unreasonable or abusive they may be.[282] Since the Court's rationale was that prison security requires unfettered access by prison staff to search for contraband, the Second Circuit and some state courts have held that cell searches initiated by prosecutors for law enforcement purposes are governed by the Fourth Amendment.[283] The Second Circuit, however, has recently limited that holding to pre-trial detainees.[284] The Eighth Amendment does protect against searches amounting to "calculated harassment unrelated to prison needs."[285]

Under *Hudson v. Palmer*, seizures of prisoners' property will ordinarily present only questions of procedural due process, and the existence of state post-conviction remedies satisfies due process under the rule of *Parratt v. Taylor*.[286] An allegation that confiscations are or result from an established state procedure takes the claim outside the scope of the *Parratt* rule.[287] Allegations that seizure of property interfere with or retaliate for the exercise of other

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[282] Hudson v. Palmer, 468 U.S. 517, 530 (1984); *see* Block v. Rutherford, 468 U.S. 576, 589-91 (1984); Bell v. Wolfish, 441 U.S. 520, 555-61 (1979) (holding that detainees need not be allowed to watch cell searches). *Cf.* U.S. v. Moody, 977 F.2d 1425, 1434-35 (11th Cir. 1992) (holding electronic surveillance of a criminal defendant talking to himself in his cell was not a custodial interrogation), *cert. denied*, 507 U.S. 1052 (1993).

[283] U.S. v. Cohen, 796 F.2d 20, 24 (2d Cir.), *cert. denied*, 479 U.S. 854 (1986); Rogers v. State, 783 So.2d 980, 992 (Fla. 2001) (holding *Hudson* did not authorize law enforcement searches of jail cell, in context of motion to disqualify State Attorney from prosecution); Lowe v. State, 203 Ga.App. 277, 416 S.E.2d 750, 752 (Ga.App. 1992).

[284] Willis v. Artuz, 301 F.3d 65, 69 (2d Cir. 2002); State v. Jackson, 321 N.J.Super. 365, 379-80, 729 A.2d 55 (1999).

[285] Hudson v. Palmer, 468 U.S. at 530; *see* Harper v. Showers, 174 F.3d 716, 720 (5th Cir. 1999) (holding allegation of searches for no purpose but harassment raised a non-frivolous Eighth Amendment claim); Scher v. Engelke, 943 F.2d 921, 923-24 (8th Cir. 1991) (affirming award of punitive damages for repeated harassing cell searches done in retaliation for a prisoner's complaints about staff misconduct), *cert. denied*, 502 U.S. 952 (1992); Wright v. Newsome, 795 F.2d 964, 968 (11th Cir. 1986) (holding allegation that cell searches and seizures were done in retaliation for lawsuits and grievances stated a constitutional claim).

[286] *Hudson*, 468 U.S. at 531-33, *citing* Parratt v. Taylor, 451 U.S. 527 (1981); *see* § III.F.4, below.

[287] Wright v. Newsome, 795 F.2d at 967 (holding allegation that "searches and consequent confiscations are the sanctioned standard operating procedure" at the prison stated a due process claim notwithstanding state remedies).

constitutional rights may state violations of those rights.[288]

Prisoners retain a limited expectation of privacy in their persons.[289] The Eleventh Circuit has held, consistently with most other circuits, that persons newly arrested may not be strip searched[290] without reasonable suspicion that the person is concealing contraband.[291] Less intrusive searches of arrestees may be upheld.[292] However, routine strip searches may be conducted of detainees who have been admitted to the jail after contact visits.[293] Courts have generally upheld strip search practices for which officials presented a reasonable security

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[288] Wright v. Newsome, 795 F.2d at 968 (holding that allegation of seizure of legal papers and law books stated a claim of denial of access to courts, and allegation that actions were taken in retaliation for lawsuits and grievances stated a First Amendment claim).

[289] Fortner v. Thomas, 983 F.2d 1024, 1030 (11th Cir. 1993) ("We are persuaded to join other circuits in recognizing a prisoner's constitutional right to bodily privacy because most people have 'a special sense of privacy in their genitals, and involuntary exposure of them in the presence of people of the other sex may be especially demeaning and humiliating.'") (citation omitted); *accord*, Peckham v. Wisconsin Dept. of Correction, 141 F.3d 694, 696-97 (7th Cir. 1998).

[290] *See* Wood v. Hancock County Sheriff's Dep't, 354 F.3d 57, 63 (1st Cir. 2003) (holding that "standing naked for inspection by officers" is a strip search regardless of any other demands).

[291] Wilson v. Jones, 251 F.3d 1340, 1343 (11th Cir. 2001); *accord*, Shain v. Ellison, 273 F.3d 56, 62-66 (2d Cir. 2001), *cert. denied*, 537 U.S. 1083 (2002); Roberts v. Rhode Island, 239 F.3d 107, 113 (1st Cir. 2001) (applying same holding where detainees were placed in same institution as convicts); *see* Skurstenis v. Jones, 236 F.3d 678, 682 (11th Cir. 2000) (holding blanket intake strip search policy unconstitutional on its face, but upholding its application to a person who was carrying a pistol on arrest).

In *Skurstenis*, the court also notoriously upheld a manual search for lice of the female plaintiff's pubic hair by a male employee, immediately before the plaintiff's release, on the ground that the search was done privately in the clinic by a memeber of the medical staff and it was done at the earliest opportunity. 236 F.3d at 683-84; *compare* Skurstenis v. Jones, 81 F.Supp. 2d 1228, 1237 (N.D.Ala. 1999) (describing incident as "the search to keep lice from escaping from the jail"). *See also* Bynum v. District of Columbia, 257 F.Supp.2d 1 (D.D.C. 2002) (holding that inmates strip searched upon return to the jail from court after receiving release orders, who were to be held only for brief processing before release, stated a Fourth Amendment claim).

[292] Stanley v. Henson, 337 F.3d 961 (7th Cir. 2003) (upholding requirement that arrestees change clothes, stripping only to their underwear, in the presence of a same-sex officer).

[293] Bell v. Wolfish, 441 U.S. 520, 558 (1979).

rationale,[294] including in one Circuit random visual body cavity searches.[295] More intrusive searches may require individualized suspicion.[296] Strip searches unrelated to legitimate security concerns or designed to harass may violate the Fourth Amendment or the Eighth Amendment.[297]

Even searches that are otherwise lawful must be conducted in a reasonable manner. They must not be needlessly intrusive,[298] abusively performed,[299] or conducted in an unnecessarily public manner.[300] More generally, courts have held that prisoners have the right not to be viewed unnecessarily in the nude or while performing private bodily functions, especially by persons of

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[294] *See* Peckham v. Wisconsin Dep't of Correction, 141 F.3d 694, 695-97 (7th Cir. 1998); Thompson v. Souza, 111 F.3d 694, 700 (9th Cir. 1997) (upholding strip searches in connection with search for drugs); Bruscino v. Carlson, 854 F.2d 162, 164-66 (7th Cir. 1988) (upholding strip searches entering or leaving Marion Control Unit); Goff v. Nix, 803 F.2d 358, 366-71 (8th Cir. 1986) (upholding strip searches entering or leaving segregation unit).

[295] Covino v. Patrissi, 967 F.2d 73, 77-80 (2d Cir. 1992).

[296] Vaughan v. Ricketts, 950 F.2d 1464, 1468-69 (9th Cir. 1991) (requiring "reasonable cause" to justify digital rectal searches).

[297] Harris v. Ostrout, 65 F.3d 912, 916 (11th Cir. 1995) (stating that if strip searches "are devoid of penological merit and imposed simply to inflict pain, the federal courts should intervene," and that they may not be used to retaliate against First Amendment-protected activity); *accord*, Peckham v. Wisconsin Dep't of Correction, 141 F.3d 694, 697 (7th Cir. 1998)

[298] Amaechi v. West, 237 F.3d 356 (4th Cir. 2001) (holding officer was not entitled to qualified immunity for a pat search under the clothing of a female misdemeanor arrestee during which his fingertip penetrated her genitals).

[299] *See* Calhoun v. DeTella, 319 F.3d 936, 940 (7th Cir. 2003) (holding strip searches accompanied by sexual harassment, with opposite sex staff as invited spectators, would be "designed to demean and humiliate" and would state an Eighth Amendment claim). *But see* Somers v. Thurman, 109 F.3d 614, 624 (9th Cir.) ("To hold that gawking, pointing, and joking violates the prohibition against cruel and unusual punishment would trivialize" the Eighth Amendment standard.), *cert. denied*, 522 U.S. 852 (1997).

A case raising a similar issue is presently under *en banc* review in the Eleventh Circuit. *See* Evans v. City of Zebulon, Ga., 351 F.3d 485 (11th Cir. 2003), *rehearing en banc granted, opinion vacated*, 364 F.3d 1298 (11th Cir. 2004).

[300] Farmer v. Perrill, 288 F.3d 1254, 1260-61 (10th Cir. 2002) (affirming denial of summary judgment as to a challenge to visual strip searches en route to the recreation yard conducted in view of other inmates; government may not simply justify the searches, but must justify doing them in the open).

the opposite sex.[301] However, applications of this idea to particular sets of facts and justifications has yielded mixed results.[302] One circuit has held that intrusive clothed pat frisks of women prisoners by male staff violated the Eighth Amendment, based on a record that many women in prison had long histories of verbal, physical, and sexual abuse by men.[303]

The extraction of bodily fluids is a search.[304] Prison officials may require prisoners to provide urine samples for drug testing either with reasonable cause or pursuant to a program that is designed to prevent selective enforcement or harassment.[305] Prisoners may be compelled to

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[301] Sepulveda v. Ramirez, 967 F.2d 1413, 1416 (9th Cir. 1992), *cert. denied,* 510 U.S. 931 (1993); *see* Fortner v. Thomas, 983 F.2d 1024, 1030 (11th Cir. 1993) (recognizing prisoners' right to bodily privacy "because most people have 'a special sense of privacy in their genitals, and involuntary exposure of them in the presence of people of the other sex may be especially demeaning and humiliating'") (*quoting* Lee v. Downs, 641 F.2d 1117, 1119 (4th Cir. 1981).)

[302] *See* Hill v. McKinley, 311 F.3d 899, 903-05 (8th Cir. 2002) (holding both male and female staff could participate in transfer of unruly naked female prisoner, since not enough female guards were available; holding that leaving the prisoner exposed on a restraint board in male officers' presence violated the Fourth Amendment); Oliver v. Scott, 276 F.3d 736, 744-46 (5th Cir. 2002) (upholding under the *Turner* reasonable relationship standard a policy "permitting all guards to monitor all inmates at all times" because it "increases the overall level of surveillance" and bathrooms and showers can be the site of violence); *compare* Moore v. Carwell, 168 F.3d 234, 237 (5th Cir. 1999) (holding allegation of strip and body cavity searches performed by an opposite sex officer absent an emergency, at a time when same sex officers were available to conduct the search, was not frivolous, "We must balance the need for the particular search against the invasion of the prisoner's personal rights caused by the search."); Somers v. Thurman, 109 F.3d 614, 617-23 (9th Cir.) (finding no clearly established Fourth Amendment protection against cross-gender strip searches, dismissing Eighth Amendment claim that female officers subjected male plaintiff to visual body cavity searches, watched him shower, pointed at him and made jokes about him), *cert. denied,* 522 U.S. 852 (1997); Hayes v. Marriott, 70 F.3d 1144, 1147-48 (10th Cir. 1995) (holding summary judgment was inappropriate given allegation that plaintiff was subjected to a body cavity search in the presence of numerous witnesses, including female correctional officers and case managers and secretaries)

[303] Jordan v. Gardner, 986 F.2d 1521, 1526-27 (9th Cir. 1993) (en banc).

[304] Skinner v. Railway Labor Executives Ass'n, 489 U.S. 602, 616 (1989).

[305] Thompson v. Souza, 111 F.3d 694, 702-03 (9th Cir. 1997) (upholding urine testing of group of 124 inmates); Lucero v. Gunter, 17 F.3d 1347, 1350 (10th Cir. 1994) (upholding random tests); Forbes v. Trigg, 976 F.2d 308, 314-15 (7th Cir. 1992) (upholding urinalysis of all inmates in certain jobs), *cert. denied,* 507 U.S. 950 (1993).

provide DNA samples pursuant to state or federal statute,[306] though there is a question as to whether that requirement may be extended to all categories of offenders.[307]

Prisoners retain other privacy interests, limited by the necessities of prison administration. They are entitled to privacy in their communications with attorneys and their assistants,[308] to confidentiality of information about their medical condition and treatment,[309] and to rights of private choice with respect to refusal of medical treatment, termination of pregnancy, and marriage and the maintenance of family relationships. They may not be put on view for the delectation of the media absent a law enforcement purpose.[310] The federal Privacy Act provides additional protections to federal prisoners from disclosure of their prison records,[311] and state law may protect broader rights of privacy for prisoners.

III. Procedural Due Process

A. Liberty in prison: *Sandin v. Conner*

In *Sandin v. Conner,*[312] the Supreme Court limited the due process protections of prisoners, holding that in-prison restrictions[313] deprive them of "liberty" within the meaning of

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[306] U.S. v. Kincade, 379 F.3d 813 (9th Cir. 2004), *pet. for cert. filed,* No. 04-7253 (Nov. 15, 2004); Velasquez v. Woods, 329 F.3d 420, 421 (5th Cir. 2003) (per curiam)

[307] *See* Groceman v. U.S. Dep't of Justice, 354 F.3d 411, 413 n.2 (per curiam) (5th Cir. 2004) (noting variety of approaches); Roe v. Marcotte, 193 F.3d 72, 81-82 (2d Cir. 1999) (affirming statute applying to sex offenders; rejecting rationale that would extend to all offenses).

[308] *See* § II.D.1, above, and § IV.B, below.

[309] Doe v. Delie, 257 F.3d 309, 316-17 (3d Cir. 2001) (finding a right to privacy in medical information extending to prescription medications and "particularly strong" for HIV status); Powell v. Schriver, 175 F.3d 107, 111 (2d Cir. 1999) (finding a right to privacy in transsexuality).

[310] Lauro v. Charles, 219 F.3d 202, 203 (2d Cir. 2000) (holding the "perp walk" "exacerbates the seizure of the arrestee unreasonably and therefore violates the Fourth Amendment."

[311] *See* Maydak v. U.S., 363 F.3d 512 (D.C.Cir. 2004) (holding that prison officials' retention of copies of photographs made during inmate visits did not violate Privacy Act).

[312] 515 U.S. 472 (1995).

[313] *Sandin* by its terms applies only to in-prison restrictions. The Court, after noting that the deprivation of statutory good time involved an interest of "real substance," 515 U.S. at 478, was careful to distinguish the prisoner's placement in segregation from actions that "inevitably affect the

the Due Process Clauses only if they "impose[] atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life."[314]

In so holding, the Court disapproved its prior prison cases applying "liberty interest" analysis, a rather technical doctrine which asked in each case whether "mandatory language and substantive predicates create an enforceable expectation that the state would produce a particular outcome with respect to the prisoner's conditions of confinement."[315] It also dismissed as dicta its prior statements that "solitary confinement" is a "major change in conditions of confinement," equivalent to loss of good time.[316] The bottom line for the plaintiff: "Based on a comparison between inmates inside and outside disciplinary segregation, the State's actions in placing him there for 30 days did not work a major disruption in his environment."[317] Under prior law, any

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duration of his sentence." *Id.* at 487. The good time issue is discussed further below.

Notwithstanding *Sandin*'s language, the Eleventh Circuit has applied its "atypical and significant" analysis in finding a liberty interest in not being labelled a sex offender pursuant to a program that did not affect prison conditions but required notification to victims and neighbors 30 days before release from prison. *See* Kirby v. Siegelman, 195 F.3d 1285, 1291 (11th Cir. 1999) (characterizing relevant *Sandin* holding as "when a change in the prisoner's conditions of confinement is so severe that it essentially exceeds the sentence imposed by the court, a prisoner is entitled to some procedural protections."). *But see* Gwinn v. Awmiller, 354 F.3d 1211, 1216-19 (10th Cir.) (holding damage to reputation by labelling as a sex offender does not give rise to a liberty interest, though reduction in rate of good time does), *cert. denied*, 125 S.Ct. 181 (2004).

[314] 515 U.S. at 484.

[315] *Sandin*, 515 U.S. at 481. This means, in (sort of) plain English, that courts examined whether state law or regulations limited the discretion of officials by linking a particular result with a particular finding or state of facts ("if x, then y," or equivalent). For example, a parole statute that said an eligible prisoner "shall" be released on parole "unless" the parole board found that one of four specified circumstances (such as "substantial risk that [the prisoner] will not conform to the conditions of parole") was present. Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex, 442 U.S. 1, 11-12 (1976). "Shall" is the mandatory language and the four specified circumstances are the "substantive predicates." Similarly, a statute that said prisoners "may" be placed in administrative segregation if one of several factors were found to be present is equivalent to a statement that they "will not" be placed in segregation if those factors are not present, resulting in the same sort of limit on official discretion. Hewitt v. Helms, 459 U.S. 460, 471-72 (1983).

[316] Sandin, 515 U.S. at 485-86, *citing* Wolff v. McDonnell, 418 U.S. 539, 571 n. 19 (1974).

[317] *Sandin*, 515 U.S. at 486 (footnote omitted).

substantial period of punitive confinement had been held to require due process protections.[318]

Under *Sandin*, prisoners' liberty is protected by due process in two situations. One involves deprivations "so severe in kind or degree (or so removed from the original terms of confinement) that they amount to deprivations of liberty," regardless of the terms of state law.[319] The paradigm cases are commitment of a prisoner to a mental institution or the involuntary administration of psychotropic drugs.[320]

The second situation in which *Sandin* recognizes prisoners' liberty includes cases in which the state has created a liberty interest through statute or regulation *and* deprivation of that interest "imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life."[321] The Eleventh Circuit has recently confirmed this approach to *Sandin*, inquiring first whether relevant regulations created a liberty interest, and second whether the plaintiff was subjected to atypical and significant hardship.[322]

B. When prison discipline requires due process

There should not be any question concerning the existence of a state-created liberty interest in disciplinary cases, since the disciplinary rules themselves ("Break the rules and you'll be punished; behave and you won't be") provide the necessary limit on discretion.[323] The difficult question is what is atypical and significant in the disciplinary context.

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[318] *See* McCann v. Coughlin, 698 F.2d 112, 121 (2d Cir. 1982) (holding 14 days' confinement requires due process).

[319] *Sandin*, 515 U.S. at 497 (Breyer, J., dissenting); *see id.* at 472 (majority opinion) (conditions "exceeding the sentence in such an unexpected manner as to give rise to protection by the Due Process Clause of its own force").

[320] *Sandin*, 515 U.S. at 484 (citing cases); *see also* Neal v. Shimoda, 131 F.3d 818 (9th Cir. 1997) (holding that labelling as a sex offender is comparable to commitment to a mental institution and therefore requires due process).

[321] *Sandin*, 515 U.S. at 484.

[322] Magluta v. Samples, 375 F.3d 1269, 1277-82 (11th Cir. 2004); *accord*, Frazier v. Coughlin, 81 F.3d 313, 317 (2d Cir. 1996) (holding that a prisoner must show "both that the confinement or restraint creates an 'atypical and significant hardship' under *Sandin*, and that the state has granted its inmates, by regulation or by statute, a protected liberty interest in remaining free from that confinement or restraint.")

[323] Sher v. Coughlin, 739 F.2d 77, 81 (2d Cir. 1984); *accord*, Gilbert v. Frazier, 931 F.2d 1581, 1582 (7th Cir. 1991); Green v. Ferrell, 801 F.2d 765 (5th Cir. 1986).

The Eleventh Circuit has said very little on this subject. Most recently, it held that an allegation that a prisoner "was confined under extremely harsh conditions–in solitary confinement (under conditions unlike other pretrial detainees or even convicted prisoners), locked in an extremely small, closet-sized space, and with minimal contact with other human beings for a prolonged time exceeding 500 days" sufficiently pled atypical and significant hardship.[324] Earlier, it had "assume[d]" that a full year of solitary confinement would be atypical and significant,[325] and held that two months in segregation was not atypical and significant.[326] It has also held that for prisoners already in severely restrictive confinement, additional deprivations–in that case, loss of two days a week of "yard time"–may have substantial "marginal value" and therefore may be atypical and significant in context.[327] However, the court has given no further guidance in the form either of signposts or of analytical principles in determining what is atypical and significant.

The best-developed analysis of *Sandin* is in the Second Circuit, which after a series of cases emphasizing the need for careful fact-finding concerning the conditions of confinement,[328] has adopted a presumptive guideline for determining whether placement in segregated confinement is atypical and significant: if the confinement is 101 days or less under "the normal conditions of SHU confinement in New York," no liberty interest is at stake unless aggravating factors of some sort are shown. If the confinement is 305 days or more under "normal" SHU conditions, the plaintiff has been deprived of liberty.[329] For periods between 101 and 305 days,

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[324] Magluta v. Samples, 375 F.3d 1269, 1282 (11th Cir. 2004). *Magluta* is about segregation that was nominally administrative in nature, but that fact is relatively unimportant for the "atypical and significant" question.

[325] Williams v. Fountain, 77 F.3d 372, 374 n.3 (11th Cir.), *cert. denied*, 519 U.S. 952 (1996).

[326] Rodgers v. Singletary, 142 F.3d 1252, 1253 (11th Cir. 1998) (per curiam).

[327] Bass v. Perrin, 170 F.3d 1312, 1318 (11th Cir. 1999).

[328] *See, e.g.*, Wright v. Coughlin, 132 F.3d 133 (2d Cir. 1998); Giakoumelos v. Coughlin, 88 F.3d 56, 62 (2d Cir. 1996); *compare* Frazier v. Coughlin, 81 F.3d at 317-18 (holding that 12 days in pre-hearing confinement is not atypical and significant based on the district court's "extensive fact-finding").

[329] Colon v. Coughlin, 215 F.3d 227, 232 (2d Cir. 2000). The court said that "the duration of SHU confinement is a distinct factor bearing on atypicality and must be carefully considered." *Id.* at 231. The relevant time period is the time actually served in cases where the prisoner does not serve the entire sentence. *Id.* at 231 n. 4; *accord,* Hanrahan v. Doling, 331 F.3d 93, 97 (2d Cir. 2003). *But* the court has recently held that for purposes of analyzing the qualified immunity of the hearing officer, the focus should be on the sentence imposed by the hearing officer, regardless of whether it was later modified. *Hanrahan*, 331 F.3d at 98.

the court prescribed "development of a detailed record," which might include "evidence of the psychological effects of prolonged confinement in isolation and the precise frequency of SHU confinements of varying durations," and which would be furthered by the appointment of counsel, "some latitude both in discovery and in presentation of pertinent evidence at trial," and particularized findings by the district court.[330] The court added that it did "not exclude the possibility that SHU confinement of less than 101 days could be shown on a record more fully developed . . . to constitute an atypical and severe hardship under *Sandin*."[331] It also noted that conditions are harsher at SHU-only facilities such as Southport Correctional Facility.

The kind of record *Colon* referred to is exemplified by the district court opinion in *Lee v. Coughlin*, in which the court received evidence from psychiatrist Stuart Grassian, M.D., that:

> The restriction of environmental stimulation and social isolation associated with confinement in solitary are strikingly toxic to mental functioning, producing a stuporous condition associated with perceptual and cognitive impairment and affective disturbances. In more severe cases, inmates so confined have developed florid delirium–a confusional psychosis with intense agitation, fearfulness, and disorganization. But even those inmates who are more psychologically resilient inevitably suffer severe psychological pain as a result of such confinement, especially when the confinement is prolonged ....[332]

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[330] *Colon*, 215 F.3d at 232.

[331] *Id.* at n. 5; *see* Ortiz v. McBride, 380 F.3d 649, 654-55 (2d Cir. 2004) (holding that 90-day confinement could be atypical and significant based on allegations *inter alia* of 24-hour confinement without exercise or showers during part of the period); Palmer v. Richards, 364 F.3d 60, 66 (2d Cir. 2004) (holding that 77 days in SHU could be atypical and significant based on allegations of deprivation of personal clothing, grooming equipment, hygienic products and materials, reading and writing materials, family pictures, personal correspondence, and contact with family, and being mechanically restrained whenever out of cell, raised a material factual question under the atypical and significant standard); *see also Colon*, 215 F.3d at 234 n. 7 (noting that segregation conditions are harsher at certain SHU-only prisons), *citing* Lee v. Coughlin, 26 F.Supp.2d 615, 632-33 (S.D.N.Y. 1998) (noting greater use of restraints, solitary exercise in restraints, limited visiting).

[332] 615 F.Supp.2d at 637 (footnote omitted).

Such observations are not new. A century ago, the Supreme Court observed that in solitary confinement, "[a] considerable number of the prisoners fell, after even a short confinement, into a semi-fatuous condition, from which it was next to impossible to arouse them, and others became violently insane; others still, committed suicide; while those who stood the ordeal better were not generally reformed, and in most cases did not recover sufficient mental activity to be of any subsequent service to the community." In re Medley, 134 U.S. 160, 168 (1890) (striking down a statute retroactively imposing solitary confinement as an *ex post facto* law). Similar evidence is cited in more modern prison conditions cases. *See* Davenport v. DeRobertis, 844 F.2d 1310, 1313, 1316

The court also received evidence that fewer than 5% of the prisoners under custody in a year were sentenced to SHU at all, and fewer than 1% received SHU sentences of a year or more; that most prisoners sentenced to confinement were placed in the less restrictive "keeplock" or cube confinement; that of prisoners sentenced to confinement, the proportion receiving more than a year in SHU was no higher than 2.2%, with an additional 2.9 to 3.1% sentenced to six months or more.[333]

That said, few if any subsequent cases have been decided on that sort of record.

The Second Circuit, unlike some other courts, has approached the "atypical and significant" question by comparing SHU conditions to those in general population.[334] In *Sandin* itself, the Court noted that the segregation conditions under which the plaintiff was confined were substantially the same as those in non-punitive administrative confinement and protective custody, and not very different from those in the maximum security confinement that the prisoner had previously occupied.[335] In New York, by contrast, there are significant differences between punitive SHU confinement and administrative and protective confinement;[336] administrative confinement is infrequently used; and in any case administrative segregation in New York is not entirely discretionary, as was the case in *Sandin*.[337] In fact, the Second Circuit has held that administrative segregation in New York itself involves sufficient constraints on official discretion to give rise to a state-created liberty interest, requiring courts to go on to the "atypical

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(7th Cir. 1988), *cert. denied*, 488 U.S. 908 (1989); McClary v.Kelly, 4 F.Supp.2d 195 (W.D.N.Y. 1998); Madrid v. Gomez, 889 F.Supp. 1146, 1235 (N.D.Cal. 1995); Langley v. Coughlin, 715 F.Supp. 522, 540 (S.D.N.Y. 1989); Baraldini v. Meese, 691 F.Supp. 432, 446-47 (D.D.C. 1988), *rev'd on other grounds*, 884 F.2d 615 (D.C.Cir. 1989); Bono v. Saxbe, 450 F.Supp. 934, 946 (E.D.Ill. 1978), *aff'd in part and remanded in part on other grounds*, 620 F.2d 609 (7th Cir. 1980). Several of these cases rely on the research and testimony of Dr. Grassian. *See* Stuart Grassian, M.D., Psychopathological Effects of Solitary Confinement, 140 Am.J.Psychiatry 11 (1983); Stuart Grassian and Nancy Friedman, Effects of Sensory Deprivation in Psychiatric Seclusion and Solitary Confinement, 8 Int'l J. of Law and Psychiatry 49 (1986).

[333] 615 F.Supp.2d at 619-23.

[334] *Colon*, 215 F.3d 227, 231.

[335] *Sandin*, 515 U.S. at 486.

[336] This may vary from prison to prison. In *McClary v. Kelly*, 4 F.Supp.2d 195, 204 (W.D.N.Y. 1998), the court found that in one of the prisons where the plaintiff was kept in administrative segregation, no attempt was made to segregate administrative segregation prisoners from disciplinary segregation prisoners.

[337] *See Lee*, 26 F.Supp.2d at 633.

and significant" part of the *Sandin* analysis.[338] It has acknowledged that administrative segregation of sufficient duration meets the *Sandin* standard.[339]

C. *Sandin* and pre-trial detainees

The Eleventh Circuit has recently applied the *Sandin* analysis in a case involving a pre-trial detainee, without questioning (and apparently without the plaintiff's questioning) whether that analysis is appropriate in a detainee case.[340] In my view and that of most courts that have actually asked the question, it is not.[341] *Sandin*'s analytical starting point is that "*given a valid conviction*, the criminal defendant has been constitutionally deprived of his liberty to the extent that the State may confine him and subject him to the rules of its prison system so long as the conditions of confinement do not otherwise violate the Constitution. . . . Confinement in any of the State's institutions is within the normal limits or range of custody which the conviction has authorized the State to impose."[342] Since *Sandin* is based on "the expected perimeters of the sentence imposed by a court of law," detainees are entitled to a due process hearing before being restrained for reasons other than to assure their appearance at trial.[343] Since *Magluta* did not actually address the question, it should be regarded as open in the Eleventh Circuit.

D. Sanctions involving the fact or duration of imprisonment: good time, parole, temporary release

Prison punishments that affect the length of incarceration, such as the deprivation of good time, remain deprivations of liberty under the *Sandin* analysis. *Sandin* echoed *Wolff v. McDonnell*'s characterization of statutory good time as an interest of "real substance."[344]

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[338] Sealey v. Giltner, 197 F.3d 578, 584-85 (2d Cir. 1999).

[339] *See* Taylor v. Rodriguez, 238 F.3d 188, 195 (2d Cir. 2001); Giano v. Kelly, 2000 WL 876855 at *8 (W.D.N.Y, May 16, 2000) ("well in excess of one year"); Hameed v. Coughlin, 37 F.Supp.2d 133, 145 (W.D.N.Y. 1999) (20 months); McClary v. Kelly, 4 F.Supp.2d 195 (W.D.N.Y. 1998) (four years).

[340] Magluta v. Samples, 375 F.3d 1269, 1278-82 (11th Cir. 2004).

[341] Benjamin v. Fraser, 264 F.3d 175, 188-89 (2d Cir. 2001); Mitchell v. Dupnik, 75 F.3d 517, 523-24 (9th Cir. 1995); Zarnes v. Rhodes, 64 F.3d 285, 292 (7th Cir. 1995).

[342] Meachum v. Fano, 427 U.S. 215, 224-25 (1976) (emphasis supplied); *compare* Sandin, 515 U.S. at 478, 483 (*citing Meachum*); *see Benjamin*, 264 F.3d at 189 (relying on *Meachum* and *Sandin*).

[343] Mitchell v. Dupnik, 75 F.3d 517, 523-24 (9th Cir. 1995).

[344] 515 U.S. at 478.

Parole matters are generally unaffected by *Sandin* because they affect the length of incarceration, rather than the "incidents of prison life" addressed in *Sandin*. Parole revocation is a liberty deprivation.[345] Denial of parole release remains a liberty deprivation if regulations create a liberty interest.[346]

Most courts say that prisoners who are in work release or other temporary release programs have a liberty interest in staying in them, requiring due process protections when officials try to remove them, if they live in the community and not in an institutional setting; but if they continue to live in a prison, halfway house, or other institution, they do not have a liberty interest.[347] Several courts have suggested (correctly, in my view) that this outcome is dictated by the Supreme Court's 1997 decision in *Young v. Harper*[348] that persons released to a "pre-parole" program in which they lived at home under conditions similar to parole were entitled to the same due process protections against revocation as are parolees.[349] The Eleventh Circuit has not addressed the question since *Young*. An older Eleventh Circuit case stated that since the temporary release at issue did not involve complete release from institutional life, there was no

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[345] Morrissey v. Brewer, 408 U.S. 471, 481 (1972); *accord*, Young v. Harper, 520 U.S. 143 (1997) (holding "preparole" program involving similar degree of liberty and similar restrictions subject to *Morrissey* holding).

[346] *See* Ellis v. District of Columbia, 84 F.3d 1413, 1417-18 (D.C.Cir. 1996) (*Greenholtz* and *Board of Pardons v. Allen* are not overruled but their reasoning is suspect); *compare id.* at 1425-26 (concurring and dissenting opinion) (*Greenholtz* and *Allen* are alive and well).

[347] Paige v. Hudson, 341 F.3d 642, 643-44 (7th Cir. 2003) (holding that removal from "home detention" to jail was a liberty deprivation requiring due process); Anderson v. Recore, 317 F.3d 194, 200 (2d Cir. 2003); Friedl v. City of New York, 210 F.3d 79, 84 (2d Cir. 2000); Asquith v. Department of Corrections, 186 F.3d 407, 410-11 (3d Cir. 1999) (holding that prisoner in work release in a halfway house was still in institutional confinement and had no liberty interest); Kim v. Hurston, 182 F.3d 113, 117 (2d Cir. 1999); Callender v. Sioux City Residential Treatment Facility, 88 F.3d 666, 668 (8th Cir. 1996) (holding a prisoner in a work release program more analogous to institutional life than parole or probation did not have a liberty interest protected by due process); Edwards v. Lockhart, 908 F.2d 299, 301-03 (8th Cir. 1990) (holding temporary release program in which the plaintiff lived at home and not in an institution was similar to parole and there was a constitutionally based liberty interest in avoiding termination).

[348] Young v. Harper, 520 U.S. 143, 117 S.Ct. 1148 (1997).

[349] Asquith v. Department of Corrections, 186 F.3d at 410-11; Friedl v. City of New York, 210 F.3d at 84; Kim v. Hurston, 182 F.3d 113, 118 (2d Cir. 1999); Paige v. Hudson, 234 F.Supp.2d 893, 901-03 (N.D.Ind. 2002), *aff'd*, 341 F.3d 642 (7th Cir. 2003).

constitutionally based liberty interest in avoiding its revocation.[350] That holding is consistent with later authority finding a liberty interest in remaining in an extra-institutional work release program.[351]

Many older decisions concerning temporary release focus on whether state statutes and regulations created a liberty interest protected by due process.[352] After *Young v. Harper* and *Sandin v. Conner*, state statutes and regulations are probably of little relevance to temporary release due process questions. Under *Young*, removal from a non-institutional program implicates a constitutionally based liberty interest. Under *Sandin*, if removal from an institutional work release program is viewed as only a change of scene in prison, there would be no liberty interest because the prisoner would merely be returned to ordinary prison conditions.[353] Removal that also put the prisoner in atypical and significant prison conditions would of course present a different issue under *Sandin*.

There is no constitutionally based liberty interest in obtaining temporary release.[354] Can statutes and regulations create a liberty interest in obtaining temporary release, as is the case with

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[350] Whitehorn v. Harrelson, 758 F.2d 1416, 1421 (11th Cir. 1985) (involving prisoner held in work release center).

[351] *See* Edwards v. Lockhart, 908 F.2d at 301-02 (distinguishing *Whitehorn* on this basis).

[352] A number of courts found liberty interests using this approach. *See, e.g.*, Lanier v. Fair, 876 F.2d 243, 247-48 (1st Cir. 1989) (liberty interest created by "Manual of Operations" and "Program Statement" that governed contract with private halfway house operator); Brennan v. Cunningham, 813 F.2d 1, 6-7 (1st Cir. 1987). Other courts concluded that statutes and regulations might create a liberty interest and have sent the cases back to lower courts for further analysis. *See* Hake v. Gunter, 824 F.2d 610, 613-16 (8th Cir. 1987); Lewis v. Thigpen, 767 F.2d 252, 261-62 (5th Cir. 1985).

[353] *See* Asquith v. Department of Corrections, 186 F.3d at 409-11; Callender v. Sioux City Residential Treatment Facility, 88 F.3d 666, 669 (8th Cir. 1996); Dominique v. Weld, 73 F.3d at 1156, 1160 (1st Cir. 1996); McGoue v. Janecka, 211 F.Supp.2d 627, 631 (E.D.Pa. 2002) (all holding that returning a work release participant to prison is not atypical and significant). *Contra*, Segretti v. Gillen, 259 F.Supp.2d 733, 737-38 (N.D.Ill. 2003); Quartararo v. Catterson, 917 F.Supp. 919, 940-41 (E.D.N.Y. 1996); Roucchio v. Coughlin, 923 F.Supp. 360, 374 (S.D.N.Y. 1996).

[354] Kitchen v. Upshaw, 286 F.3d 179, 186-87 (4th Cir. 2002); Lee v. Governor of State of New York, 87 F.3d 55, 58 (2d Cir. 1996); Mahfouz v. Lockhart, 826 F.2d 791, 792 (8th Cir. 1987); Baumann v. Arizona Dept. of Corrections, 754 F.2d 841, 843-45 (9th Cir. 1985); Romer v. Morgenthau, 119 F.Supp.2d 346, 357-58 (S.D.N.Y. 2000).

parole?[355] Before *Sandin v. Conner*, some courts had found liberty interests in admission to temporary release in statutes and regulations,[356] though most had not, because in most cases the statutes and regulations left prison officials with so much discretion in granting temporary release to create a liberty interest.[357] If *Sandin v. Conner*'s requirement that prisoners show "atypical and significant hardship" compared to ordinary prison conditions[358] applies to admission to temporary release, prisoners do not have a liberty interest, because staying in prison is not atypical and significant compared to staying in prison.[359] On the other hand, if temporary release programs in which the prisoner lives in the community are constitutionally similar to parole, as courts have said since the Supreme Court decided *Young v. Harper*,[360] it would seem that statutes and regulations could create a liberty interest,[361] just as some parole statutes and regulations do.

E. Prison discipline and habeas exhaustion

State prisoners seeking the return of good time, or other relief affecting the fact or duration of imprisonment, are subject to the exhaustion requirement of the federal habeas corpus statute and must exhaust state remedies before proceeding in federal court.[362] There was a protracted controversy over whether this rule applied only when the return of good time, or other

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[355] As discussed above, *see* n. 346, statutes and regulations governing parole release can create a liberty interest if they place sufficient limits on official discretion (though most do not).

[356] *See* Winsett v. McGinnes, 617 F.2d 996, 1007-08 (3d Cir. 1980) (en banc) (holding that where discretion to release is governed by certain criteria, an eligible inmate has a liberty interest that is violated by consideration of factors outside those criteria), *cert. denied sub nom.* Anderson v. Winsett, 449 U.S. 1093 (1981); Olynick v. Taylor County, 643 F.Supp. 1100, 1103-04 (W.D.Wis. 1986) (denial of work release that was mandated by sentencing judge denied due process); In re Head, 147 Cal.App.3d 1125, 195 Cal.Rptr. 593, 596-98 (Cal.App. 1983). *But see* Francis v. Fox, 838 F.2d at 1149 n. 8; Baumann v. Arizona Dept. of Corrections, 754 F.2d at 845-46 (both disagreeing with *Winsett v. McGinnes*).

[357] *See, e.g.*, DeTomaso v. McGinnis, 970 F.2d 211, 212-13 (7th Cir. 1992); Canterino v. Wilson, 869 F.2d 948, 953 (6th Cir. 1989); Francis v. Fox, 838 F.2d 1147, 1149-50 (11th Cir. 1988).

[358] *See* § III.A, above.

[359] *See* Kitchen v. Upshaw, 286 F.3d 179, 186-87 (4th Cir. 2002).

[360] *See* nn. 347-48, above.

[361] *But see* Gambino v. Gerlinski, 96 F.Supp.2d 456, 459-60 (M.D.Pa.) (holding federal work release statute did not create a liberty interest because it was not explicitly mandatory and did not contain specified substantive predicates), *aff'd*, 216 F.3d 1075 (3d Cir. 2000).

[362] Preiser v. Rodriguez, 411 U.S. 475, 494 (1973).

change in the duration of confinement, was part of the relief sought, or whether it also applied to cases where the plaintiff challenged a proceeding that affected the length of sentence without actually requesting confinement-related relief. In *Heck v. Humphrey*,[363] the court held that prisoners cannot bring actions "that necessarily require the plaintiff to prove the unlawfulness of his conviction or confinement" without first getting the conviction or sentence overturned via a state court proceeding or via a federal court writ of habeas corpus.

Heck was a damage suit arising from the plaintiff's criminal conviction. The *Heck* rule was extended to prison disciplinary proceedings involving the loss of good time in *Edwards v. Balisok*,[364] which held that damage claims that would "necessarily imply the invalidity" of a challenged disciplinary proceeding affecting the fact or duration of confinement must also be preceded by exhaustion of state remedies.[365] The claim is not cognizable under § 1983 until the adverse decision is overturned either in a state forum or via federal habeas corpus, and a § 1983 claim should be dismissed, not stayed, until that is accomplished.[366] Most recently, the Court confirmed that the *Heck/Balisok* rule does not apply to prison disciplinary proceedings that do not result in deprivation of good time or otherwise affect the length of imprisonment.[367]

The scope of the *Heck/Balisok* rule is limited to suits that would "necessarily imply" the invalidity of the disciplinary proceeding. That would be the case only if a suit constituted an attack on the integrity or the procedures of the hearing, as in *Balisok* itself, where the prisoner alleged that he was denied the right to call witnesses and the hearing officer was not impartial. A suit that merely alleges facts that are inconsistent with a disciplinary conviction (e.g., the prisoner was convicted of assaulting an officer, but alleges that in reality the officer assaulted him or her) does not "necessarily imply" the invalidity of the proceeding.[368] A prison disciplinary proceeding that rests on false evidence is not invalid as long as it meets the requirements of procedural due process.[369]

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[363] 512 U.S. 477, 485 (1994).

[364] 520 U.S. 641 (1997).

[365] *Id.*, 520 U.S. at 646.

[366] *Id.* at 649.

[367] Muhammad v. Close, 540 U.S. 709 (2004) (per curiam).

[368] *See* Beeson v. Fishkill Correctional Facility, 28 F.Supp.2d 884, 887 (S.D.N.Y. 1998) (holding claim that defendants assaulted the plaintiff and destroyed his property in events leading up to a disciplinary hearing was not barred by *Balisok* because it did not challenge the disciplinary findings).

[369] Freeman v. Rideout, 808 F.2d 949, 951-53 (2d Cir. 1986), *cert. denied*, 485 U.S. 982 (1988).

The Eleventh Circuit has held that "'it is proper for a district court to treat a petition for release from administrative segregation as a petition for a writ of habeas corpus' because '[s]uch release falls into the category of "fact or duration of physical imprisonment" delineated in *Preiser v. Rodriguez*.'"[370] That holding is probably not good law after the Supreme Court's decision in *Muhammad v. Close*.[371]

Courts including the Eleventh Circuit have heard federal court challenges to temporary release denial and revocation under the civil rights statutes and have not required that they be pursued via petition for habeas corpus after exhaustion of state judicial remedies.[372]

F. The process due

1. Disciplinary proceedings

The Supreme Court set out the requirements of prison disciplinary due process in *Wolff v. McDonnell* and said these were not "graven in stone."[373] They have been supplemented to some degree by the lower courts.

a. Notice

Inmates must receive written notice of the charges against them at least 24 hours before the hearing.[374] The purpose of the notice is "to inform [the inmate] of the charges and to enable

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[370] Medberry v. Crosby, 351 F.3d 1049, 1053 (11th Cir. 2003).

[371] 124 S.Ct. 1303 (2004) (per curiam). In *Muhammad*, the Court held that a suit seeking damages for placement in segregation was not governed by the rule requiring favorable termination in a state forum or via habeas corpus of a claim that if successful would be at odds with a state criminal conviction or sentence calculation. The Court stated that the plaintiff "raised no claim on which habeas relief could have been granted on any recognized theory. . . ." 124 S.Ct. at 1306. Though the plaintiff was not actually seeking release from segregation in *Muhammad*, the quoted statement is integral to the Court's explanation of its disposition of the case and cannot be dismissed as dictum.

[372] *See* Kim v. Hurston, 182 F.3d 113, 118 n.3 (2d Cir. 1999) (holding that temporary release revocation claim is about "conditions of confinement" and need not be pursued via habeas corpus); Graham v. Broglin, 922 F.2d 379, 381-82 (7th Cir. 1991); Gwin v. Snow, 870 F.2d 616, 624 (11th Cir. 1989); Hake v. Gunter, 824 F.2d 610, 611 (8th Cir. 1987); Jamieson v. Robinson, 641 F.2d at 141 (holding § 1983 an appropriate remedy); Wright v. Cuyler, 624 F.2d 455, 457-59 (3d Cir. 1980).

[373] 418 U.S. 539, 471-72 (1974).

[374] Wolff v. McDonnell, 418 U.S. at 564.

him to marshal the facts and prepare a defense."[375] Accordingly, the prisoner must be allowed to retain possession of the notice pending the hearing.[376] It must also be reasonably specific about what the prisoner is accused of doing.[377] Merely listing the number or name of the rule that the prisoner allegedly violated is not enough.[378] Some variation between the rule cited in the notice and the rule the prisoner is found to have broken is permissible as long as the notice described what the prisoner allegedly did.[379]

b. Hearings: the right to hear and to be heard

The most basic due process right is the right to be heard, and refusing even to listen denies due process.[380] Prisoners also have the right to hear–i.e., to be informed of the evidence in order to respond to it.[381] Prison officials are obligated to take the necessary steps so prisoners can

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[375] Wolff v. McDonnell, 418 U.S. at 564; *see* Brown v. District of Columbia, 66 F.Supp.2d 41, 45 (D.D.C. 1999) (stating "plaintiff was simply not afforded the most basic process–an opportunity to know the basis on which a decision will be made and to present his views on that issue or issues.")

[376] Benitez v. Wolff, 985 F.2d 662, 665 (2d Cir. 1993).

[377] Sira v. Morton, 380 F.3d 57, 72 (2d Cir. 2004) (holding "there must be sufficient factual specificity to permit a reasonable person to understand what conduct is at issue so that he may identify relevant evidence and present a defense"); Rinehart v. Brewer, 483 F.Supp. 165, 169 (S.D.Iowa 1980) (notice must contain date, general time and location of incident, a general description of the incident, citation to rules violated, and identification of other persons involved).

[378] Pino v. Dalsheim, 605 F.Supp. 1305, 1315 (S.D.N.Y. 1985); Powell v. Ward, 487 F.Supp. 917, 926-27 (S.D.N.Y. 1980), *aff'd as modified*, 643 F.2d 924 (2d Cir. 1981).

[379] *See* Kalwasinski v. Morse, 201 F.3d 103, 108 (2d Cir. 1999) (where notice said the plaintiff had threatened to kill an officer, even if the death threat was not confirmed at the hearing, the plaintiff had had sufficient notice he was accused of making verbal threats); *compare* Sira v. Morton, 380 F.3d 57, 71 (2d Cir. 2004) (". . . [U]nlike *Kalwasinski*, this is not a case where one discrepancy in a misbehavior report can be excused because other details provided adequate notice of the conduct at issue.")

[380] Jackson v. Cain, 864 F.2d 1235, 1252 (5th Cir. 1989); McCann v. Coughlin, 698 F.2d 112, 123 (2d Cir. 1983) (prisoner tried to present a defense to one charge, was interrupted and told that the committee was moving on to the next charge); *see* Pino v. Dalsheim, 605 F.Supp. 1305, 1318 (S.D.N.Y. 1985) (fact-finder is required to "consider in good faith the substance of the inmate's defense").

[381] Sira v. Morton, 380 F.3d 57, 74 (2d Cir. 2004) ("An inmate's due process right to know the evidence upon which a discipline ruling is based is well established. . . . Such disclosure affords the inmate a reasonable opportunity to explain his actions and to alert officials to possible defects in the

hear and be heard.[382]

In order to hear and be heard, prisoners must be present at the hearing.[383] However, because there is no right to confrontation and cross-examination, the testimony of some witnesses may be taken outside the prisoner's presence.[384] Under exceptional circumstances, an accused prisoner may be excluded entirely from the disciplinary hearing if the hearing officer "reliably concludes that his presence would unduly threaten institutional safety or undermine correctional goals."[385]

c. Witnesses

Prisoners have the right to call witnesses when it is not "unduly hazardous to institutional safety or correctional goals."[386] Prison officials can decline to call witnesses if their reasons are "logically related to preventing undue hazards to 'institutional safety or correctional goals.'"[387] Witnesses may be denied for reasons such as "irrelevance, lack of necessity, or the hazards

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evidence."); Francis v. Coughlin, 891 F.2d 43, 47 (2d Cir. 1989) (evidence must be disclosed at the hearing and not after it); Rosario v. Selsky, 169 A.D.2d 955, 564 N.Y.S.2d 851, 852 (N.Y.App.Div. 1991) (prisoner should have been informed of photo array from which he was identified; failure to do so deprived him of the opportunity to defend himself and denied due process).

[382] *See* Dean v. Thomas, 933 F.Supp. 600, 604-07 (S.D.Miss. 1996) (the fact that the jail was new and officials had not "formally established" a disciplinary process or had the staff present to conduct hearings did not justify failing to give hearings for the first six months the jail was open); Clarkson v. Coughlin, 898 F.Supp. 1019, 1050 (S.D.N.Y. 1995) (failure to provide interpretive services for deaf and hearing-impaired prisoners at hearings denied due process); Powell v. Ward, 487 F.Supp. 917, 932 (S.D.N.Y. 1980) (inmates who speak only Spanish must be provided translators at the hearing), *aff'd as modified*, 643 F.2d 924 (2d Cir.1981).

[383] Battle v. Barton, 970 F.2d 779, 782 (11th Cir. 1992) (inmate's presence "is one of the essential due process protections afforded by the Fourteenth Amendment"), *cert. denied*, 507 U.S. 927 (1993).

[384] Wade v. Farley, 869 F.Supp. 1365, 1375 (N.D.Ind. 1994) (exclusion of prisoner while a staff witness was testifying did not deny due process).

[385] Malik v. Tanner, 697 F.Supp. 1294, 1302-03 (S.D.N.Y. 1988); *accord*, Battle v. Barton, 970 F.2d at 782-83 (upholding removal of prisoner who refused to state his name and prison number); Payne v. Axelrod, 871 F.Supp. 1551, 1557 (N.D.N.Y. 1995) (threats of violence justified exclusion from hearing).

[386] Wolff v. McDonnell, 418 U.S. 539, 566 (1974); *see* Edwards v. Balisok, 520 U.S. 641, 646 (1997) (refusal to call any witnesses was "an obvious procedural defect").

[387] Ponte v. Real, 471 U.S. 491, 497 (1985).

presented in individual cases."[388] But prison officials may not automatically refuse to call multiple witnesses,[389] especially when a prisoner "faces a credibility problem trying to disprove the charges of a prison guard."[390] The refusal to call eyewitnesses to a disputed incident is particularly likely to deny due process.[391] Blanket policies of denying witnesses, or types of witnesses (including staff members), have generally been held unconstitutional; the reason for denying a particular witness should be related to the specific facts of the case.[392]

If prison officials refuse to call requested witnesses, the burden is on them to explain their decision at least "in a limited manner."[393] However, they need not explain it or write it down at

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[388] Wolff v. McDonnell, 418 U.S. at 566; *see* Kalwasinski v. Morse, 201 F.3d 103, 109 (2d Cir. 1999) (upholding the exclusion of officer witnesses who were not present at the incident); Green v. Coughlin, 633 F.Supp. 1166, 1168-70 (S.D.N.Y. 1986) (upholding denial of witnesses who had been involved in the same riot plaintiff was accused of; their written statements had been obtained).

[389] Fox v. Coughlin, 893 F.2d 475, 478 (2d Cir. 1990) (denial of two witnesses out of seven was not justified; they could not be assumed to be cumulative just because they signed the disciplinary report); Fox v. Dalsheim, 112 A.D.2d 368, 491 N.Y.S.2d 820, 821 (N.Y.App.Div. 1985) (where two officers had testified, two others should have been called, because their testimony might not have agreed with the others'.)

[390] Ramer v. Kerby, 936 F.2d 1102, 1104 (10th Cir. 1991).

[391] Pannell v. McBride, 306 F.3d 499, 503 (7th Cir. 2002) (per curiam) (refusal to call officers present at a search where contraband was found might deny due process); Bryan v. Duckworth, 88 F.3d 431, 434 (7th Cir. 1996) (refusal to call a nurse, the only potential non-prisoner witness except the complaining officer, might deny due process); Scott v. Coughlin, 78 F.Supp.2d 299, 313 (S.D.N.Y. 2000) (the denial of witnesses who were present at the incident supported the prisoner's due process claim); Gilbert v. Selsky, 867 F.Supp. 159, 165-66 (S.D.N.Y. 1994) (in theft case, refusal to call the officer who allegedly let the prisoner into the area where it occurred, other officers who could vouch for the his whereabouts at the time, and other inmates who had access to the stolen materials, denied due process); Vasquez v. Coughlin, 726 F.Supp. at 469-70 (where the prisoner was charged with a stabbing, the failure to call the alleged victim raised a due process issue).

[392] Piggie v. Cotton, 342 F.3d 660, 666 (7th Cir. 2003) (per curiam), *cert. denied*, 124 S.Ct. 1049 (2004); Whitlock v. Johnson, 153 F.3d 380, 386-88 (7th Cir. 1998); Ramer v. Kerby, 936 F.2d at 1104; Dalton v. Hutto, 713 F.2d 75, 76 (4th Cir. 1983); McCann v. Coughlin, 698 F.2d 112, 122-23 (2d Cir. 1983). The Second Circuit has upheld a rule permitting mental health staff to be consulted by the hearing officer but not called as witnesses. Powell v. Coughlin, 953 F.2d 744, 749 (2d Cir. 1991).

[393] Ponte v. Real, 471 U.S. 491, 497 (1985); *see* Ayers v. Ryan, 152 F.3d 77, 81-82 (2d Cir. 1998) (when prison officials refuse to interview a witness, they have the burden of showing that their

the time of the hearing; they may present their explanation when sued.[394] Prison officials may be required to make reasonable efforts to identify and locate witnesses that the prisoner cannot completely identify.[395]

Courts have differed over whether witnesses called by the accused prisoner should ordinarily appear and testify at the hearing, absent a good reason to the contrary in a particular case,[396] or whether they can be interviewed by prison personnel outside the prisoner's presence.[397] Even if there is a good reason not to "call" a witness in the prisoner's presence, the prisoner should be informed of the substance of the testimony.[398]

d. Confrontation and cross-examination

There is no constitutional right to "confrontation and cross-examination of those furnishing evidence against the inmate."[399] Prison officials are therefore not required to present

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conduct was rational; "oversight" is not an adequate justification). Rules permitting witnesses to refuse to appear without explanation have been struck down. Piggie v. Cotton, 342 F.3d 660, 666 (7th Cir. 2003) (per curiam), *cert. denied*, 124 S.Ct. 1049 (2004); Forbes v. Trigg, 976 F.2d at 316-18.

[394] Ponte v. Real, 471 U.S. at 497.

[395] Kingsley v. Bureau of Prisons, 937 F.2d 26, 31 (2d Cir. 1991) (prisoner did not know witnesses' names, but officials had a list of them); Grandison v. Cuyler, 774 F.2d 598, 604 (3d Cir. 1985) (inmate gave witness's name but got his number wrong); Pino v. Dalsheim, 605 F.Supp. 1305, 1317-18 (S.D.N.Y. 1985) (officials first refused to identify, then refused to interview, previous occupants of cell where contraband was found).

[396] *See* Whitlock v. Johnson, 153 F.3d 380, 388 (7th Cir. 1998); Mitchell v. Dupnik, 75 F.3d 517, 525-26 (9th Cir. 1996).

[397] *See* Kalwasinski v. Morse, 201 F.3d 103, 108-09 (2d Cir. 1999); Francis v. Coughlin, 891 F.2d 43, 48 (2d Cir. 1989) (witnesses may be interviewed outside the hearing by the hearing officer).

[398] Sira v. Morton, 380 F.3d 57, 74 (2d Cir. 2003) ("An inmate's due process right to know the evidence upon which a discipline ruling is based is well established."); Espinoza v. Peterson, 283 F.3d 949, 953 (8th Cir. 2002) (upholding refusal to return a transferred inmate to the prison to testify where his presence would have been a security risk and prison officials obtained a written statement from him); Francis v. Coughlin, 891 F.2d at 47-48.

[399] Wolff v. McDonnell, 418 U.S. 539, 567-69 (1974) (emphasis supplied); *accord*, Baxter v. Palmigiano, 425 U.S. 308, 320-23 (1976); *see also* Murphy v. Superintendent, Massachusetts Correctional Institution, 396 Mass. 830, 489 N.E.2d 661, 662 (1986) (confrontation not required by state constitution).

the testimony of their witnesses–staff members or inmates–at the hearing in the prisoner's presence.[400] In the case of staff members, some courts have held that they need not personally testify or be interviewed at all, and that a written report can be sufficient evidence to convict[401] (though if the prisoner asks for witnesses who are staff members, prison officials will have to justify their refusal to call them). If witnesses are presented outside the prisoner's presence, due process requires that the prisoner be informed of what they said.[402]

e. Documentary and physical evidence

Documentary evidence, like witness testimony, may be presented where doing so would not be "unduly hazardous to institutional safety or correctional goals."[403] Prison officials have the discretion "to limit access to other inmates to collect statements or to compile other documentary evidence."[404] Numerous courts have held that there is a limited due process right to examine, or to have produced at the hearing, documents in prison officials' possession that may help determine guilt.[405] Some courts have held that the "*Brady* rule," which requires the

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[400] Brown-Bey v. United States, 720 F.2d 467, 469 (7th Cir. 1983) (prisoner accused of assault could be required to leave the hearing during the victim's testimony); United States ex rel. Speller v. Lane, 509 F.Supp. 796, 800 (S.D.Ill. 1981) (witnesses can be interviewed over the telephone).

[401] People ex rel. Vega v. Smith, 66 N.Y.2d 130, 495 N.Y.S.2d 332, 485 N.E.2d 997, 1002-04 (N.Y. 1985). In *Vega*, the court limited its ruling to written reports based on personal knowledge and properly dated and signed, and noted that the inmate would generally have the right to call the officer who wrote the report as a witness if she so chose.

To support a conviction, written reports must state with specificity what the particular inmate did that violated the rules. Bryant v. Coughlin, 77 N.Y.2d 642, 569 N.Y.S.2d 582, 572 N.E.2d 23, 26 (N.Y. 1991) (reports stating that "all inmates in the Messhall were actively participating in this riot" did not constitute substantial evidence of particular prisoners' guilt).

[402] *See* Francis v. Coughlin, 891 F.2d 43, 47-48 (2d Cir. 1989); Powell v. Ward, 487 F.Supp. 917, 929 (S.D.N.Y. 1980), *aff'd as modified*, 643 F.2d 924 (2d Cir.1981); Daigle v. Hall, 387 F.Supp. 652, 660 (D.Mass. 1975) (if testimony is not presented directly by witnesses, "it nevertheless must be revealed to the inmate with sufficient detail to permit the inmate to rebut it intelligently").

[403] Wolff v. McDonnell, 418 U.S. 539, 566 (1974).

[404] *Id.*

[405] Piggie v. Cotton, 344 F.3d 674, 678 (7th Cir. 2003) (holding "an inmate is entitled to disclosure of material, exculpatory evidence in prison disciplinary hearings unless such disclosure would unduly threaten institutional concerns."); Smith v. Mass. Dept. of Correction, 936 F.2d 1390, 1401 (1st Cir. 1991) (prison officials must explain denial of "relevant and important documents central to the construction of a defense"); Giano v. Sullivan, 709 F.Supp. 1209, 1215 (S.D.N.Y.

disclosure of material exculpatory evidence in criminal prosecutions, also applies to prison disciplinary proceedings.[406] Videotapes are a type of document; courts have held that disciplinary bodies must review relevant videotapes, and prisoners must be shown videotapes that are used as evidence against them, unless there is a specific security reason not to do so.[407]

Courts have suggested that there may also be a limited due process right to have physical evidence produced at the hearing when it is particularly important to determining guilt or innocence.[408]

f. Assistance with a defense

There is no constitutional right to counsel in the disciplinary process.[409] However, if an inmate is illiterate or the issues are so complex that it is unlikely she can present her case adequately, assistance from a staff member or another inmate may be required.[410] In my view prisoners with significant mental problems should also be entitled to such assistance,[411] since

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1989) (unjustified refusal to produce officers' eyewitness reports of the incident denied due process).

[406] Piggie v. Cotton, 344 F.3d at 678, *citing* Brady v. Maryland, 373 U.S. 83 (1963); Thompson v. Hawk, 978 F.Supp. 1421, 1424 (D.Kan. 1997).

[407] Piggie v. Cotton, 344 F.3d at 678-79 ("We have never approved of a blanket policy of keeping confidential security camera videotapes for safety reasons. . . ."; where is it not apparent whether the tape is exculpatory or not, "minimal due process" requires that the district court review the tape in camera); Mayers v. Anderson, 93 F.Supp.2d 962, 965 (N.D.Ind. 2000) (failure to review a videotape without a stated reason denied due process).

[408] Young v. Lynch, 846 F.2d 960, 963 (4th Cir. 1988) (due process may require production of evidence "when it is the dispositive item of proof, it is critical to the inmate's defense, it is in the custody of prison officials, and it could be produced without impairing institutional concerns").

[409] Baxter v. Palmigiano, 425 U.S. 308, 315 (1976); Wolff v. McDonnell, 418 U.S. 539, 569-70 (1974).

[410] Wolff v. McDonnell, 418 U.S. at 570-71; *see* Brown v. O'Keefe, 141 A.D.2d 915, 529 N.Y.S.2d 48 (N.Y.App.Div. 1988) (accusation of drug use based on urinalysis was a "complex case" requiring assistance).

[411] The Supreme Court has not addressed this issue directly in the context of prison disciplinary proceedings, but it held that counsel is required when a prisoner is committed to a mental institution, observing that someone "thought to be suffering from a mental disease or defect" presumably needs help even more than an illiterate or uneducated one. Vitek v. Jones, 445 U.S. 480, 496-97 (1980). This reasoning is equally applicable to disciplinary hearings. *See* People ex rel. Reed v. Scully, 140 Misc.2d 379, 531 N.Y.S.2d 196 (N.Y.Sup. 1988) (an inmate acquitted by reason of mental disease

they too are unlikely to be able to present a defense. Common sense suggests that prisoners who do not speak English should also be entitled to assistance.[412] The Second Circuit has held that prisoners who are placed in segregation before their hearings have a right to assistance from a staff member, since an inmate who is locked up is prevented from effectively preparing her case, just like an inmate who is illiterate or one faced with extremely complex issues.[413]

The Court in *Wolff* did not spell out exactly what the role of an assistant should be. The Second Circuit has held that staff assistance must be provided "in good faith and in the best interests of the inmate."[414] In New York, the courts have held that the assistant's job is to investigate and gather evidence, not to act like a lawyer at the hearing.[415] The hearing officer cannot properly serve as the prisoner's assistant.[416]

If a staff member is appointed as an assistant and then does not actually assist the prisoner, that failure to assist denies due process.[417]

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in a criminal trial should have had an assistant appointed to help present an insanity defense at his disciplinary hearing). *But see* Horne v. Coughlin, 191 F.3d 244 (2d Cir. 1999) (declining to decide whether a mentally retarded prisoner was entitled to assistance).

[412] State law or prison regulations sometimes require this. *See, e.g.*, Rivera v. Smith, 110 A.D.2d 1043, 489 N.Y.S.2d 131 (N.Y.App.Div. 1985).

[413] Eng v. Coughlin, 858 F.2d 889, 898 (2d Cir. 1988) (requiring assistance for prisoners in pre-hearing segregation).

[414] Eng v. Coughlin, 858 F.2d at 898.

[415] Gunn v. Ward, 52 N.Y.2d 1017, 1018, 438 N.Y.S.2d 302, 420 N.E.2d 100 (N.Y. 1981); *see* Lee v. Coughlin, 902 F.Supp. 424, 433 (S.D.N.Y. 1995) (holding that an assistant is supposed to *prepare* a defense, not just assist after the hearing begins).

[416] Lee v. Coughlin, 902 F.Supp. 424, 433 (S.D.N.Y. 1995) ("Were I to adopt defendants' position that a hearing officer and an inmate assistant could be the same person, the confined inmate's right to an assistant and an impartial hearing officer would be rendered meaningless."); *see* Ayers v. Ryan, 152 F.3d 77, 81 (2d Cir. 1998) (prisoner did not waive the right to an assistant by agreeing to the hearing officer's "irregular" proposal to act as an assistant).

[417] Grandison v. Cuyler, 774 F.2d 598, 604 (3d Cir. 1985) (allowance of only five minutes consultation with an inmate assistant was inadequately justified); McConnell v. Selsky, 877 F.Supp. 117, 123 (S.D.N.Y. 1994) (refusal of employee assistant to interview two officers because they worked on a different shift, combined with hearing officer's refusal to appoint another assistant or interview the officers, denied due process); Giano v. Sullivan, 709 F.Supp. 1209, 1215 (S.D.N.Y. 1989) (failure of assistant to help the prisoner denied due process); Pino v. Dalsheim, 605 F.Supp. 1305, 1318 (S.D.N.Y. 1985) (due process was violated by assistant's failure to carry out "basic,

g. Impartial decision-maker

Due process requires an impartial fact-finder–that is, one whose mind is not already made up and who can give the prisoner a fair hearing.[418] The courts have held that prison officials in general can be sufficiently impartial,[419] but "[t]he degree of impartiality required of prison officials does not rise to the level of that required of judges generally."[420] A hearing officer can be impartial even if she has previously presided over hearings involving the same prisoner.[421] However, someone who was involved in the current incident or the filing of charges, witnessed the incident, or investigated it is generally not considered impartial.[422] The present or prior relationship between a hearing officer and either the prisoner or staff members involved in the hearing may impair impartiality.[423] Committees or hearing officers may also show lack of

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reasonable and non-disruptive requests"); *see also* Ayers v. Ryan, 152 F.3d 77, 81 (2d Cir. 1998) (hearing officer's statement that he would assist the plaintiff by calling witnesses, and then failure to do so, denied due process).

[418] An impartial decisionmaker "does not prejudge the evidence and . . . cannot say . . . how he would assess evidence he has not yet seen." Patterson v. Coughlin, 905 F.2d 564, 570 (2d Cir. 1990); *see* Edwards v. Balisok, 540 U.S. 641, 647 (1997) (due process requirements "are not so lax as to let stand the decision of a biased hearing officer who dishonestly suppresses evidence of innocence"); Hodges v. Scully, 141 A.D.2d 729, 529 N.Y.S.2d 832, 834 (N.Y.App.Div. 1988) (a hearing officer who already had a written and signed disposition in front of him while he conducted the hearing committed a "patent violation" of the right to impartiality).

[419] *Wolff*, 418 U.S. at 570-71. Officials may not be disqualified simply because they have security responsibilities. Powell v. Ward, 542 F.2d 101, 103 (2d Cir. 1976).

[420] Allen v. Cuomo, 100 F.3d 253, 259 (2d Cir. 1996) (holding that hearing officers' impartiality was not compromised by the perception that the $5.00 surcharge on all disciplinary convictions might raise revenue to prevent prison staff layoffs).

[421] Pannell v. McBride, 306 F.3d 499, 502 (7th Cir. 2002) (per curiam); Black v. Selsky, 15 F.Supp.2d 311, 317 (W.D.N.Y. 1998) (hearing officer was not biased based on having denied the plaintiff a time cut on another charge).

[422] Diercks v. Durham, 959 F.2d 710, 713 (8th Cir. 1992); Merritt v. De Los Santos, 721 F.2d 598, 600-01 (7th Cir. 1983); Rhodes v. Robinson, 612 F.2d 677, 773 (3d Cir. 1979); Powell v. Ward, 487 F.Supp. 917, 931 (S.D.N.Y. 1980), *aff'd as modified*, 643 F.2d 924 (2d Cir. 1981).

[423] *See* Eads v. Hanks, 380 F.3d 728, 729 (7th Cir. 2002) (stating in dictum that the spouse or "significant other" of a witness might not be impartial); Malek v. Camp, 822 F.2d 812, 815-16 (8th Cir. 1987) (allegation that a hearing officer knew the plaintiff had helped another inmate sue him stated a due process claim).

impartiality by their statements and actions at the hearings.[424]

h. Standards of proof and evidence

Due process requires that a prison disciplinary conviction be supported by "some evidence."[425] That is the standard a reviewing court applies to the proceeding and the record. The question of burden of proof–the standard that the fact-finder must apply–is entirely different. In *Goff v. Dailey*, the first federal appeals court to consider the question held that "some evidence" is the burden of proof, as well as the standard of review, in disciplinary proceedings[426]–that is, if there is *any* evidence that the prisoner is guilty, the fact-finder can convict, even if there is overwhelming evidence of innocence.

The Vermont Supreme Court has found the *Goff* decision "unpersuasive" and held–correctly in my view–that due process requires the burden of proof to be the "preponderance of the evidence."[427] The "some evidence" test, while useful in reviewing a

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[424] Edwards v. Balisok, 540 U.S. 641, 647 (1997) (decision of a "biased hearing officer who dishonestly suppresses evidence of innocence" cannot stand); Francis v. Coughlin, 891 F.2d 43, 46-47 (2d Cir. 1989) (allegations that hearing officer suppressed evidence, distorted testimony, and never informed the plaintiff of evidence against him raised a material issue of lack of impartiality); Farid v. Goord, 200 F.Supp.2d 220, 243-44 (W.D.N.Y. 2002) (refusal of hearing officer to recuse himself despite some evidence of bias against Muslims supported a due process claim); Giano v. Sullivan, 709 F.Supp. 1209, 1217 (S.D.N.Y. 1989) (continued presence of staff witnesses, including the lieutenant who drafted the misbehavior report, who interrupted the prisoner while he testified and stayed with the hearing officer while he drafted his findings, created an "unacceptable risk of unfairness").

[425] Superintendent v. Hill, 472 U.S. 445, 457 (1985); *see* Brown v. Fauver, 819 F.2d 395, 398-99 (3d Cir. 1987) (distinguishing burden of proof from standard of review); LaFaso v. Patrissi, 633 A.2d 695, 697 (Vt. 1993) (noting that *Superintendent v. Hill* addressed the standard of review and not the standard of proof).

[426] Goff v. Dailey, 991 F.2d 1437, 1440-43 (8th Cir. 1993). The Supreme Court of Iowa, the state where *Goff* originated, has agreed with *Goff*. Backstrom v. Iowa District Ct. for Jones County, 508 N.W.2d 705 (Iowa 1993). More recently, several judges of that court realized that *Goff* and *Backstrom* were wrongly decided, but they did not persuade the court majority. Marshall v. State, 524 N.W.2d 150, 152-53 (Iowa 1994).

[427] LaFaso v. Patrissi, 633 A.2d at 699-700; *see also* Brown v. Fauver, 819 F.2d at 399 n.4 (expressing doubt whether a "some evidence" burden of proof meets due process standards). The preponderance standard "simply requires the trier of fact 'to believe that the existence of a fact is more probable than its nonexistence.'" In re Winship, 397 U.S. 358, 371 (1970) (Harlan, J., concurring) (citation omitted).

decision that has already been made, is simply not designed for the initial fact-finding. As the Vermont court observed, the Supreme Court in *Superintendent v. Hill*

> stated that its "some evidence" standard "does not require examination of the entire record, independent assessment of the credibility of witnesses, or weighing of the evidence." . . . We find incredible the suggestion that a *de novo* proceeding intended to determine the guilt or innocence of any individual could dispense with these procedures and retain a semblance of "fundamental fairness."[428]

As the lower court in *Goff* pointed out, and the Vermont court agreed, the accepted due process "balancing test" supports the use of a higher standard than "some evidence." ". . . [T]he inmate's interest in not being erroneously disciplined is an important one; the risk of error with use of a 'some evidence' standard is high; and the state's interest in swift and certain punishment is not impeded by the use of the preponderance standard of proof." In addition, the state has no interest in treating innocent people as if they were guilty.[429]

As a standard of judicial review, the "some evidence" standard is the lowest possible. Under it, courts will not make an "independent assessment of the credibility of witnesses"[430] or otherwise get involved in weighing the evidence or second-guessing the disciplinary committee's finding of guilt.[431] The courts will intervene only if there is no evidence at all to support the charge.[432] (As the footnoted cases show, most "no evidence" cases have some evidence of

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[428] LaFaso v. Patrissi, 633 A.2d at 698; *see* Valmonte v. Bane, 18 F.3d 992 (2d Cir. 1994) (noting that a "some credible evidence" standard "does not require the factfinder to weigh conflicting evidence").

[429] Goff v. Dailey, 991 F.2d at 1444 (dissenting opinion) (citations omitted); *accord*, LaFaso v. Patrissi, 633 A.2d at 698-700 ("We conclude there is a very significant risk of erroneous discipline of an innocent inmate under a 'some evidence' standard of proof.").

[430] Superintendent v. Hill, 472 U.S. at 455.

[431] Hudson v. Johnson, 242 F.3d 534, 537 (5th Cir. 2001); Cummings v. Dunn, 630 F.2d 649, 650 (8th Cir. 1980); Walsh v. Finn, 865 F.Supp. 126, 129 (S.D.N.Y. 1994) (under the "some evidence" standard, "[o]nce the court determines that the evidence is reliable, its inquiry ends–it should not look further to see whether other evidence in the record may have suggested a contrary conclusion.").

[432] *See, e.g.*, Burnsworth v. Gunderson, 179 F.3d 771, 772-74 (9th Cir. 1999) (there was no evidence that a prisoner who said that if did not get protective custody, his only option would be to "hit the fence," actually escaped or attempted to escape); Lenea v. Lane, 882 F.2d 1171, 1175-76 (7th Cir. 1989) (there was no evidence that the prisoner had aided an escape based on the facts that he knew the escapees, had spoken to one on the day of the escape, was legitimately in the general area when they escaped, and was found to be "deceptive" during a polygraph test); Cerda v. O'Leary, 746

something, but the evidence lacks sufficient logical connection with the charge against the prisoner.) Restitution orders must be supported by evidence of the amount of money required for restitution.[433]

A number of courts have cautioned that "the 'some evidence' standard requires some 'reliable evidence.'"[434] One court has said that if "'some evidence' is to be distinguished from 'no evidence,' it must possess at least some minimal probative value . . . to satisfy the requirement of the Due Process Clause that the decisions of prison administrators must have some basis in fact." Evidence may be "rendered so suspect by the manner and circumstances in which given as to fall short of constituting a basis in fact" for imposing discipline. The "some evidence" standard does not "require that credence be given to that evidence which common

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F.Supp. 820, 825 (N.D.Ill. 1990) (evidence discrediting the prisoner's alibi but not affirmatively supporting his guilt was not any evidence of the infraction); Adams v. Wolff, 624 F.Supp. 1036, 1040 (D.Nev. 1985) (stab wounds alone did not constitute evidence of fighting); Edwards v. White, 501 F.Supp. 8, 11 (M.D.Pa. 1979) (possession of a petition with no signatures was no evidence of a "conspiracy to disrupt prison routine"), *aff'd*, 633 F.2d 209 (3d Cir. 1980); United States ex rel. Smith v. Robinson, 495 F.Supp. 696, 701 (E.D.Pa. 1980) (contraband charge was not supported by any evidence that seized items were really contraband); Harper v. State, 463 N.W.2d 418, 420-21 (Iowa 1990) (the fact that an inmate broke a minor rule was no evidence that he disobeyed a lawful order); Matter of Reismiller, 101 Wash.2d 291, 678 P.2d 323, 326 (Wash. 1984) (no evidence was produced linking the prisoner with the contraband).

[433] Keeling v. Schaefer, 181 F.Supp.2d 1206, 1224-25 (D.Kan. 2001); Dawes v. Carpenter, 899 F.Supp. 892, 898 (N.D.N.Y. 1995) (a standardized schedule of costs would meet the some evidence standard); Artway v. Scheidemantel, 671 F.Supp. 330 (D.N.J. 1987) (an inmate could not be sentenced to restitution for destruction of property where the hearing did not address the value of the property).

[434] Sira v. Morton, 380 F.3d 57, 69 (2d Cir. 2004); *accord*, Luna v. Pico, 356 F.3d 481, 489 (2d Cir. 2004) (holding due process violated when a prisoner "is punished solely on the basis of a victim's hearsay accusation without any indication in the record as to why the victim should be credited"; accuser had refused to confirm his allegation and there was no other evidence or assessment of credibility); Moore v. Plaster, 266 F.3d 928, 931-32 (8th Cir. 2001) (conclusory statements were not some evidence); Broussard v. Johnson, 253 F.3d 874, 877 (5th Cir. 2001) (holding that after unreliable informant evidence was eliminated, the presence of bolt cutters in an area where 100 inmate had access was not "some evidence" possessing escape contraband); Zavaro v. Coughlin, 970 F.2d 1148, 1153-54 (2d Cir. 1992) (statements that "every inmate" out of 100 in the messhall participated in a disturbance were so "blatantly implausible" that they did not constitute some evidence of a particular inmate's guilt); Gilbert v. Selsky, 867 F.Supp. 159, 165 (S.D.N.Y. 1994) (similar to *Broussard*); Hayes v. McBride, 965 F.Supp. 1186, 1189-90 (N.D.Ind. 1997) (officer said the prisoner admitted a substance was an intoxicant, the prisoner denied it; without any other evidence that the substance was an intoxicant, the "some evidence" standard was not met).

sense and experience suggest is incredible."[435] Although conflicts in evidence do not preclude a disciplinary conviction as long as there is evidence against the prisoner, some courts have held that exculpatory evidence may be more significant when it "directly undercuts the reliability of the evidence on which the disciplinary authority relied or there are other extra-ordinary circumstances."[436] In such cases there must be sufficient evidence of the reliability of the evidence against the prisoner, and an explanation of why the exculpatory evidence is rejected.[437]

The Supreme Court has held that a prisoner's silence at a hearing can be used as evidence of guilt without violating the Fifth Amendment's privilege against self-incrimination, in a case where there was other evidence of guilt.[438] Can a prisoner's silence therefore constitute "some evidence" all by itself? The Second Circuit has said that a prisoner's refusal to testify "created such a strong adverse presumption as to render further testimony irrelevant."[439] However, since the decision does not make clear whether there was other evidence in the record independent of the witnesses who were not called, it is not clear whether the court actually ruled that silence meets the "some evidence" requirement. The notion that refusal to testify, without more, establishes guilt appears inconsistent with recent decisions, just discussed, holding that some *reliable* evidence is required.

"Evidence" is defined broadly, and prison hearings need not follow the rules of evidence applied in courts. Testimony need not be under oath,[440] and hearsay is admissible.[441] In

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[435] Goff v. Burton, 91 F.3d 1188, 1192 (8th Cir. 1996) (holding the some evidence standard was not met where a confidential informant gave hearsay testimony and no staff member spoke with the source of the hearsay, and the victim of the alleged assault made inconsistent statements, never testified under oath, did not appear at the disciplinary hearing, and gave statements in response to leading questions and the promise of a transfer to a more desirable prison).

[436] Viens v. Daniels, 871 F.2d 1328, 1335 (7th Cir. 1989).

[437] Meeks v. McBride, 81 F.3d 717, 720-21 (7th Cir. 1996) (toxicology report of drug use did not meet the "some evidence" standard because there were two instances of unreliable identifying information in the report and the plaintiff showed there was another inmate with the same name who had been confused with him in prior disciplinary proceedings, and the defendants submitted no evidence bolstering the reliability of the report).

[438] Baxter v. Palmigiano, 425 U.S. 308, 317-18 (1976).

[439] Scott v. Kelly, 962 F.2d 145, 147 (2d Cir. 1992).

[440] Ruley v. Nevada Bd. of Prison Comm'rs, 628 F.Supp. 108, 111-12 (D.Nev. 1986).

[441] Rodgers v. Thomas, 879 F.2d 380, 383 (8th Cir. 1989) (hearsay verified by the disciplinary committee did not deny due process); Rudd v. Sargent, 866 F.2d 260, 262 (8th Cir. 1989); Moore v. Selsky, 900 F.Supp. 670, 674-75 (S.D.N.Y. 1995) (letter from a drug test

particular, written reports by prison staff–a type of hearsay–can be sufficient evidence to prove a disciplinary violation,[442] at least as long as they are based on personal knowledge and properly signed and dated.[443] However, courts have cautioned that hearsay that is completely uncorroborated and has no other indications of reliability does not constitute some evidence.[444] The determination whether there was some evidence to support a disciplinary conviction must be limited to evidence in the administrative record.[445]

i. Urinalysis, polygraphy, and other scientific tests

Prison officials may use various kinds of scientific tests in disciplinary proceedings, but they are not required to do so. Most courts have held that prisoners may be convicted of drug use based on results of the EMIT ("Enzyme Multiple Immunoassay Test") urinalysis test or other reliable test, confirmed by a second test; no additional evidence is required.[446]

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manufacturer, which stated that no drugs or diseases had been identified which produce a false positive reaction for cocaine or cannabinoids, was hearsay but was "some evidence").

[442] McPherson v. McBride, 188 F.3d 784, 786 (7th Cir. 1999) (report was sufficient to support disciplinary conviction, despite its brevity, where it described the infraction in sufficient detail and the conduct clearly violated prison rules); Carter v. Kane, 938 F.Supp. 282, 287 (E.D.Pa. 1996) (holding a misbehavior report by an officer who witnessed the misconduct can support a disciplinary conviction).

[443] People ex rel. Vega v. Smith, 485 N.E.2d at 1002-04; *see* Walsh v. Finn, 865 F.Supp. 126, 129-30 (S.D.N.Y. 1994) (a misbehavior report written by an officer who did not actually see the alleged misconduct is not some evidence); Rodriguez v. Coughlin, 176 A.D.2d 1234, 577 N.Y.S.2d 190, 191 (N.Y.App.Div. 1991) (misbehavior reports not based on personal knowledge were not substantial evidence).

[444] Luna v. Pico, 356 F.3d 481, 489 (2d Cir. 2004); Young v. Kann, 926 F.2d 1396, 1402 (3d Cir. 1991) (reliance on a prison employee's oral summary of an allegedly threatening letter, without reading the letter, may deny due process); Howard v. Wilkerson, 768 F.Supp. 1002, 1008 (S.D.N.Y. 1991) (hearsay information with no evidence supporting its credibility was not "some evidence"); Parker v. State, 597 So.2d 753, 754 (Ala.Cr.App. 1992) (staff member's report based on what other inmates told him was not "some evidence").

[445] Riggins v. Walter, 279 F.3d 422, 428-29 (7th Cir. 1995).

[446] Higgs v. Bland, 888 F.2d 443, 448-49 (6th Cir. 1989); Peranzo v. Coughlin, 850 F.2d 125 (2d Cir. 1988) (per curiam); Spence v. Farrier, 807 F.2d 753, 756 (8th Cir. 1986); Wade v. Farley, 869 F.Supp. 1365, 1370 (N.D.Ind. 1994); Pella v. Adams, 702 F.Supp. 244, 247 (D.Nev. 1988) and cases cited.

A "reasonably reliable chain of custody" for urine samples must be maintained.[447]

The failure to perform scientific tests to establish facts in a disciplinary proceeding does not deny due process if there is enough other evidence to support the conviction.[448] The use of polygraph testing as an investigative matter is within the discretion of prison officials.[449] Although most courts hold that polygraph evidence is admissible in disciplinary hearings,[450] a polygraph that shows only that the prisoner is not truthful is not evidence of the underlying charge; it is only evidence of lack of credibility.[451]

j. Written disposition

Prisoners are entitled to a "'written statement by the factfinders as to the evidence relied

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[447] Soto v. Lord, 693 F.Supp. 8, 17-20 (S.D.N.Y. 1988); *accord*, Madera v. Goord, 103 F.Supp.2d 536, 540 (N.D.N.Y. 2000); Thomas v. McBride, 3 F.Supp.2d 989, 993-94 (N.D.Ind. 1998); Wykoff v. Resig, 613 F.Supp. 1504, 1513 (N.D.Ind. 1985). *Contra*, Thompson v. Owens, 889 F.2d 500, 501-02 (3d Cir. 1989) (stating that requiring a chain of custody would be an "independent assessment" of evidence not permitted under the "some evidence" standard).

[448] Griffin v. Spratt, 969 F.2d 16, 22 (3d Cir. 1992) (officer's testimony that he believed material was fermented could support a conviction); Okocci v. Klein, C.O., 270 F.Supp.2d 603, 611 (E.D.Pa. 2003) (weapon need not be examined for fingerprints); Spaulding v. Collins, 867 F.Supp. 499, 509 (S.D.Tex. 1993) (handwriting analysis of documents not required).

[449] Hester v. McBride, 966 F.Supp. 765, 773 (N.D.Ind. 1997); Wright v. Caspari, 779 F.Supp. 1025, 1028-29 (E.D.Mo. 1992); Losee v. State, 374 N.W.2d 402, 404-05 (Iowa 1985); Pruitt v. State, 274 S.C. 565, 266 S.E.2d 779, 782 (S.C. 1980); *cf.* United States ex rel. Wilson v. DeRobertis, 508 F.Supp. 360, 362 (N.D.Ill. 1981) (polygraph might sometimes be necessary to ensure fairness, but not under the circumstances of this case).

[450] Lenea v. Lane, 882 F.2d 1171, 1174 (7th Cir. 1989) and cases cited; *see* Wiggett v. Oregon State Penitentiary, 85 Or.App. 635, 738 P.2d 580, 583 (Or.App. 1987) (polygraph evidence admissible when obtained by a state certified and licensed examiner), *review denied*, 304 Or. 186, 743 P.2d 736 (Or. 1987).

[451] Lenea v. Lane, 882 F.2d at 1176; Parker v. Oregon State Correctional Institution, 87 Or.App. 354, 742 P.2d 617 (Or.App. 1987); *see* Brown v. Smith, 828 F.2d 1493, 1495 (10th Cir. 1987) (one "inconclusive" polygraph test, plus a second one interpreted as showing that the prisoner was withholding information, did not support a conviction for assault); *see also* Johnson v. State, 576 So.2d 1289, 1290 (Ala.Crim.App. 1991) (polygraph supporting the hearsay statement of a witness who was not produced was not "some evidence" of guilt).

on and the reasons' for the disciplinary action."[452] The Supreme Court added: "It may be that there will be occasions when personal or institutional safety are so implicated, that the statement may properly exclude certain items of evidence, but in that event the statement should indicate the fact of the omission."[453]

Several courts have held that the written statement must be reasonably specific about the reasons for the decision.[454] Other courts have been less demanding.[455] One decision stated that "the kind of statements that will satisfy the constitutional minimum will vary from case to case depending on the severity of the charges and the complexity of the factual circumstances and proof offered by both sides. . . ."[456]

In my view, specificity–including explanation of credibility judgments–should be required in all statements of reasons because it will encourage fairer decisions. In prison and elsewhere, "[a] reasons requirement promotes thought by the decision-maker, focuses attention on the relevant points and further protects against arbitrary and capricious decisions grounded

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[452] Wolff v. McDonnell, 418 U.S. 539, 565 (1974), *quoting* Morrissey v. Brewer, 408 U.S. 471, 489 (1972); *accord*, Lewis v. Smith, 855 F.2d 736, 737-38 (11th Cir. 1988) (awarding damages for violation)..

[453] Wolff v. McDonnell, 418 U.S. at 565.

[454] *See, e.g.*, Whitford v. Boglino, 63 F.3d 527, 536-37 (7th Cir. 1995) (holding failure to explain credibility judgment supports a due process claim); Dyson v. Kocik, 689 F.2d 466, 467-68 (3d Cir. 1982) (holding statement may not simply adopt the officer's report, *e.g.*, "Inmate is guilty of misconduct as written"); King v. Wells, 760 F.2d 89, 93 (6th Cir. 1985) (stating "each item of evidence relied on by the hearing officer should be included in the report unless safety concerns dictate otherwise"); Chavis v. Rowe, 643 F.2d 1281, 1286-87 (7th Cir.) Robinson v. Young, 674 F.Supp. 1356, 1368 (W.D.Wis. 1987) (stating the disposition should point out facts, mention evidence, and explain credibility judgments).

[455] Hensley v. Wilson, 850 F.2d 269, 278 (6th Cir. 1988) (holding credibility judgments need not be explained); Brown v. Frey, 807 F.2d 1407, 1409-13 (8th Cir. 1986) (holding that as long as the officers' reports are not so long or so contradictory or ambiguous that one can't tell what the fact-finder relied on, the disposition can merely incorporate them by reference); *accord*, Mujahid v. Apao, 795 F.Supp. 1020, 1027 (D.Haw. 1992).

[456] Culbert v. Young, 834 F.2d 624, 630-31 (7th Cir. 1987). This court held that in a case where there was substantial evidence that the prisoner was innocent, and in a complex case involving severe punishment, dispositions that merely adopted the officer's and investigator's reports did not meet due process standards. However, it held that in a simple case where the only issue is the relative credibility of an inmate and an officer, the disciplinary committee may merely refer to the officer's report.

upon impermissible or erroneous considerations."[457] In prison, it is all too easy for a factfinder simply to assume that officers are always telling the truth and inmates are always lying, and to issue rubber-stamp decisions on that basis without giving each case serious and individualized attention.[458] The very lenient "some evidence" standard of judicial review makes it easy for prison officials to get away with such a practice. In my view, especially where the only issue, or the main issue, is who is telling the truth, prison disciplinary committees should be required to explain themselves clearly and fully.

k. Confidential informants

Prison officials sometimes rely on information from informants whom they do not produce or identify, and whose allegations they sometimes do not disclose in any detail,[459] a practice that "invites disciplinary sanctions on the basis of trumped up charges."[460] Courts allow such proceedings because they understand that there may be a risk of violence and retaliation in connection with disciplinary proceedings.[461] The Second Circuit, like other courts, has held that even in a confidential informant case, the prisoner must receive notice with "sufficient factual specificity to permit a reasonable person to understand what conduct is at issue so that he may identify relevant evidence and present a defense." Even if some details are not known to prison officials, "an inmate can at least be given any general information regarding the relevant time and

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[457] Jackson v. Ward, 458 F.Supp. 546, 565 (W.D.N.Y. 1978) and cases cited; *accord*, State ex rel. Meeks v. Gagnon, 289 N.W.2d at 363; *see* Dunlop v. Bachowski, 421 U.S. 560, 572 (1975) (same conclusion in a non-constitutional case). An example of this point is *Chavis v. Rowe*, 643 F.2d 1281, 1287 (7th Cir.), *cert. denied*, 454 U.S. 907 (1981), in which a prisoner was convicted of assault and put in segregation for five months before a review board cleared him. The court observed that if the committee had made detailed findings in the first place, the prisoner might never have been wrongfully punished.

[458] The Supreme Court has acknowledged that credibility judgments in prison disciplinary hearings are often between inmates and the committee's co-workers and that fact-finders "thus are under obvious pressure to resolve a disciplinary dispute in favor of the institution and their fellow employee." Cleavinger v. Saxner, 474 U.S. 193, 204 (1985).

[459] For example, in *Smith v. Rabalais*, 659 F.2d 539, 541-44 (5th Cir. 1980), *cert. denied*, 455 U.S. 992 (1982), the court upheld a disciplinary conviction in which the prisoner was accused of selling an unspecified amount of drugs, which were not described, to unidentified persons at an undisclosed number of undisclosed times and places.

[460] Helms v. Hewitt, 655 F.2d 487, 502 (3d Cir. 1981), *rev'd on other grounds sub nom.* Hewitt v. Helms, 459 U.S. 460 (1983); *see also* McCollum v. Miller, 695 F.2d 1044, 1049 (7th Cir. 1982) (noting danger of use of disciplinary hearings for "schemes of revenge").

[461] Sira v. Morton, 380 F.2d 57, 78 (2d Cir. 2004).

place that is known to the authorities" and a statement that other facts are unknown.[462] At the hearing itself, the "due process right to know the evidence upon which a discipline ruling is based"[463] may have to be compromised, but prison officials who do so "must offer a reasonable justification for their actions, if not contemporaneously, then when challenged in a court action."[464]

At the hearing, courts have recognized that if the usual due process safeguards are bypassed, other safeguards become more necessary.[465] Due process therefore requires that prison officials independently establish the reliability of confidential informants.[466] "A bald assertion by

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[462] Sira v. Morton, 380 F.3d at 72; *see* Rinehart v. Brewer, 483 F.Supp. 165, 169 (S.D.Iowa 1980) (holding that prison officials should usually give notice of the date, "general time" and place of the incident, a general description of the incident, and the identity of other persons involved, deleting from the notice only those specific facts that would cause security problems if disclosed, and giving the inmate notice that certain types of facts were deleted). *But see* Freitas v. Auger, 837 F.2d 806, 809 (8th Cir. 1988) (holding notice sufficient where it generally described the accused prisoner's conduct without giving dates, places, or the identities of others involved); Zimmerlee v. Keeney, 831 F.2d 183, 188 (9th Cir. 1987) (notice was sufficient that charged the prisoner with smuggling marijuana and amphetamines with members of a prison club at some time during a five-month period).

[463] Sira v. Morton, 380 F.3d at 74.

[464] *Sira*, 380 F.3d at 75, *citing* Ponte v. Real, 471 U.S. 491, 498 (1985). In *Sira*, the court noted that it appeared from the record that much of the evidence withheld from the plaintiff could have been disclosed without identifying the informants.

[465] Sira v. Morton, 380 F.3d at 78; McCollum v. Miller, 695 F.2d at 1048-49.

[466] Williams v. Fountain, 77 F.3d 372, 375 (11th Cir.) (noting that this requirement's purpose is both to foster reliable prison investigations but also to enable meaningful appellate review), *cert. denied*, 519 U.S. 952 (1996); *accord*, Sira v. Morton, 380 F.3d at 77-78; Whitford v. Boglino, 63 F.3d 527, 535-36 (7th Cir. 1995) (holding that the use of confidential informant testimony without some evidence of reliability would deny due process, and defendants' failure to come forward with such evidence amounted to an admission they did not meet legal requirements); Zavaro v. Coughlin, 970 F.2d 1148, 1153-54 and n. 1 (2d Cir. 1992); Taylor v. Wallace, 931 F.2d 698, 702 (10th Cir. 1991); Hensley v. Wilson, 850 F.2d 269, 276 (6th Cir. 1988).

The Eleventh Circuit has held that if there is sufficient evidence to support the conviction independently from unsupported informant information, due process is satisfied. Williams v. Fountain, *id.*, *citing* Young v. Jones, 37 F.3d 1457 (11th Cir. 1994), *cert. denied*, 514 U.S. 1054 (11th Cir. 1996). That seems wrong. The question should be not whether the fact-finder *could* have convicted without the due process violation but whether it *would* have done so.

an unidentified person, without more, cannot constitute some evidence of guilt."[467] The Eleventh Circuit has said that there must be support for "the credibility of confidential informants *and* the reliability of the information provided by them,"[468] suggesting there must be some corroboration for the current information and not just a finding that they have provided correct information in the past.[469]

The evidence establishing the reliability of informants need not be disclosed to the accused prisoner at the hearing or in the statement of reasons because it would risk disclosing the informant's identity.[470] Courts have disagreed whether that information must be documented at the time of the hearing or whether it can be reconstructed after the fact.[471]

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[467] Freitas v. Auger, 837 F.2d at 810; *accord*, Broussard v. Johnson, 253 F.3d 874, 876 (5th Cir. 2001) (holding reliability was not established where the investigating officer testified only to what the warden had told him about the informant and the hearing officer did not receive any other evidence of reliability); Brown v. Smith, 828 F.2d 1493, 1495 (10th Cir. 1987); Cato v. Rushen, 824 F.2d 703, 705 (9th Cir. 1987) (hearsay provided via a confidential informant who was later polygraphed inconclusively did not meet the "some evidence" test); Cerda v. O'Leary, 746 F.Supp. 820, 825 (N.D.Ill. 1990).

[468] Williams v. Fountain, 77 F.3d at 375 (emphasis supplied).

[469] The Second Circuit has so held. Sira v. Morton, 380 F.3d at 78 (holding hearing officers must consider the totality of the circumstances and not just past record for credibility). Other courts appear to accept past reliability alone as one alternative means of establishing credibility. *See* Hensley v. Wilson, 850 F.2d at 277 (committee may rely on an investigator's report if it states that the informant "has proved reliable in specific past instances *or* that the informant's story has been independently corroborated on specific material points.") (emphasis supplied). One court has suggested several alternative ways that reliability may be established:

> (1) the oath of the investigating officer as to the truth of his report containing confidential information and his appearance before the disciplinary committee . . .; (2) corroborating testimony . . .; (3) a statement on the record by the chairman of the disciplinary committee that, "he had firsthand knowledge of the sources of information and considered them reliable on the basis of 'their past record of reliability'," . . .; or (4) in camera[] review of material documenting the investigator's assessment of the credibility of the confidential informant.

Mendoza v. Miller, 779 F.2d 1287, 1293 (7th Cir. 1985).

[470] Hensley v. Wilson, 850 F.2d at 279.

[471] *Compare* Williams v. Fountain, 77 F.3d 372, 375 (11th Cir.) (use of confidential informants requires documentation in the record of some good faith investigation and findings as to their credibility and the reliability of their information), *cert. denied*, 519 U.S. 952 (1996); Hensley v. Wilson, 850 F.2d at 280-83 (stating a contemporaneous documentation requirement "eliminates the

In my view, a case relying on confidential informants is a complex case in which the prisoner should have the right to a staff assistant who can examine the informant evidence and the alleged basis for its reliability. So far, the courts have not adopted this position.[472]

l. False charges

False or unfounded charges do not deny due process as long as prison officials go through the required procedural motions.[473] However, disciplinary charges brought in retaliation for filing grievances, making complaints, pursuing lawsuits, or engaging in other activities protected by the Constitution violate the substantive constitutional right in question.[474]

m. Discipline and mental health

The courts have not fully explored the constitutional issues involved in disciplining prisoners who have mental disorders. The New York courts have held that in a "disciplinary proceeding in which a prisoner's mental state is at issue, a hearing officer is required to consider evidence regarding the prisoner's mental condition."[475] One court has stated that a prisoner found

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possibility that officials might later search around for evidence which would have warranted a committee in deeming an informant reliable"); Freitas v. Auger, 837 F.2d at 811 n. 11, quoting Rinehart v. Brewer, 483 F.Supp. 165, 170 (S.D. Iowa 1980) *with* Taylor v. Wallace, 931 F.2d at 702; Riggins v. Walter, 279 F.3d 422, 429 n.11 (7th Cir. 1995) (holding reliability may be established after the fact and not just from the administrative record); Broussard v. Johnson, 253 F.3d 874, 876-77 (5th Cir. 2001) (giving information to the magistrate judge *in camera* did not establish reliability; the question is what evidence was presented *to the disciplinary board.*)

The Supreme Court in *Ponte v. Real*, 471 U.S. 491 (1985), held that a refusal to call witnesses need not be explained or documented at the time of the hearing. The court in *Hensley v. Wilson* explains at length why that holding is not applicable to documentation of the reliability of confidential informants.

[472] *See* Hudson v. Hedgepeth, 92 F.3d 748, 751 (8th Cir. 1996); Sauls v. State, 467 N.W.2d 1, 3 (Iowa App. 1990).

[473] Sprouse v. Babcock, 870 F.2d 450, 452 (8th Cir. 1989); Freeman v. Rideout, 808 F.2d 949, 951-53 (2d Cir. 1986), *cert. denied*, 485 U.S. 982 (1988); Hanrahan v. Lane, 747 F.2d 1137, 1140-41 (7th Cir. 1984).

[474] *See* § IV.A.3, below, for a discussion of retaliation claims.

[475] Matter of Huggins v. Coughlin, 76 N.Y.2d 904, 561 N.Y.S.2d 910, 563 N.E.2d 281, 282 (N.Y. 1990); *see* Rosado v. Kuhlmann, 164 A.D.2d 199, 563 N.Y.S.2d 295, 297 (N.Y.App.Div. 1990) (evidence of mental condition should have been considered in a case in which the prisoner assaulted

insane in a criminal trial should be able to present an insanity defense when charged with a disciplinary offense for the same actions.[476] Some courts have held that the Constitution forbids punishment for behavior caused or influenced by mental illness.[477]

Courts have also condemned the housing of mentally disturbed inmates in punitive segregation units.[478] Placing mentally ill inmates in punitive segregation may constitute cruel and unusual punishment in some cases,[479] and at a minimum such inmates must be screened by qualified mental health staff before they are placed in segregation.

Prisoners with significant mental problems facing disciplinary proceedings should also be entitled to assistance from a counsel substitute, in my view.[480]

n. Punishment

The Due Process Clause does not limit prison punishments, but physical abuse and foul and degrading conditions of punitive confinement constitute cruel and unusual punishment.[481]

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staff in the course of an emergency referral to the psychiatric unit). *But see* Zamakshari v. Dvoskin, 899 F.Supp. 1097, 1107 (S.D.N.Y. 1994) (the failure to consider mental health status did not violate clearly established law as of 1988). *Cf.* Powell v. Coughlin, 953 F.2d 744, 749 (2d Cir. 1991) (upholding a policy permitting mental health staff to be consulted by the hearing officer but not called as witnesses).

[476] People ex rel. Reed v. Scully, 140 Misc.2d 379, 531 N.Y.S.2d 196 (N.Y.Sup. 1988).

[477] See Arnold on behalf of H.B. v. Lewis, 803 F.Supp. 246, 256 (D.Ariz. 1992) (placement in lockdown "as punishment for the symptoms of [the plaintiff's] mental illness and as an alternative to providing mental health care" violated the Eighth Amendment); Cameron v. Tomes, 783 F.Supp. 1511, 1524-25 (D.Mass. 1992) (application of standard disciplinary procedures to a sex offender in a "Treatment Center for the Sexually Dangerous" amounted to punishing him for his psychological problems and, when done without consultation with mental health staff, violated the "professional judgment" standard applied to civilly committed persons), *aff'd as modified*, 990 F.2d 14, 21 (1st Cir. 1993).

[478] *See* Inmates of Occoquan v. Barry, 717 F.Supp. 854, 868 (D.D.C. 1989); Langley v. Coughlin, 715 F.Supp. 522, 543-44 (S.D.N.Y. 1989); Langley v. Coughlin, 709 F.Supp. 482, 484-85 (S.D.N.Y. 1989), *appeal dismissed*, 888 F.2d 252 (2d Cir. 1989).

[479] *See* Arnold on behalf of H.B. v. Lewis, 803 F.Supp. at 256.

[480] *See* § III.F.1.f, above.

[481] *See* Hope v. Pelzer, 536 U.S. 730, 738 (2002) (restraining prisoners to "hitching post" held unconstitutional); Jackson v. Bishop, 404 F.2d 571, 579 (8th Cir. 1968) (use of the "strap" held

Punishments may also be held to be cruel and unusual if they are grossly disproportionate to the offense,[482] but courts are "extremely reluctant" to find prison punishments to be disproportionate.[483] The Supreme Court upheld a 30-day limit on punitive segregation in one case, but that decision was based mostly on the extremely bad conditions of confinement.[484] The Eleventh Circuit has held that twelve years and counting in *administrative* segregation after an escape and several escape attempts, but with no significant misconduct in the preceding ten years, raised serious constitutional questions, especially in light of the allegation that the confinement was in fact punitive. [485]

Monetary restitution for property damage or other offenses that cost the prison money is a legitimate form of punishment.[486] Restitution orders must be supported by evidence of the value

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unconstitutional). *But see* Trammell v. Keane, 338 F.3d 155, 162, 165-66 (2d Cir. 2003) (upholding "deprivation order" denying recreation, showers, hot water, and all property except for one pair of shorts to a prisoner who persistently misbehaved in punitive segregation).

[482] Pearson v. Ramos, 237 F.3d 881, 885 (7th Cir. 2001) (stating that court "continue[s] to recognize" norm of proportionality); Adams v. Carlson, 368 F.Supp. 1050, 1053 (E.D.Ill.) (sixteen months' segregation excessive for involvement in a work stoppage), *on remand from* 488 F.2d 619 (7th Cir. 1973); Black v. Brown, 524 F.Supp. 856, 858 (N.D.Ill. 1981) (eighteen months' segregation excessive for running in the yard), *aff'd in part and rev'd in part*, 688 F.2d 841 (7th Cir. 1982); Hardwick v. Ault, 447 F.Supp. 116, 125-26 (M.D.Ga. 1978); (indefinite segregation held per se disproportionate); Fulwood v. Clemmer, 206 F.Supp. 370, 379 (D.D.C. 1962) (two years' segregation excessive for disruptive preaching).

[483] Savage v. Snow, 575 F.Supp. 828, 836 (S.D.N.Y. 1983) (upholding 90 days' loss of good time and confinement in segregation for abuse of correspondence privileges); *see* Pearson v. Ramos, 237 F.3d 881, 885 (7th Cir. 2001) (upholding four consecutive 90-day sentences to loss of yard time for a segregation prisoner based on assaulting an officer, setting a fire, spitting in an officer's face, and throwing a broom and "bodily fluids" on a staff member); Grady v. Wilken, 735 F.2d 303, 305 (8th Cir. 1984) (upholding six months' segregation for extortion); Dixon v. Goord, 224 F.Supp.2d 739, 748 (S.D.N.Y. 2002) (upholding ten months for assaulting an officer).

[484] Hutto v. Finney, 437 U.S. 678, 686-87 (1978). *Compare* Sostre v. McGinnis, 442 F.2d 178, 192-93 (2d Cir. 1971) (refusing to impose a limit on segregation time).

[485] Sheley v. Dugger, 833 F.3d 1420, 1429 (11th Cir. 1987).

[486] Longmire v. Guste, 921 F.2d 620, 623-24 (5th Cir. 1991) (upholding state statute providing for restitution); Campbell v. Miller, 787 F.2d 217, 224-25 (7th Cir. 1986) (upholding impoundment of prisoner's account pending compliance with $1,445 restitution order imposed after a *Wolff* hearing).

of the items that the prisoner is alleged to have destroyed or damaged.[487]

o. Disciplinary rules

Many things can be forbidden in prison that could not be forbidden in the "free world."[488] It is very hard to get a prison disciplinary rule struck down as unconstitutional on its face unless it severely restricts basic constitutional rights. Courts are somewhat more willing to strike down particular applications of rules.[489]

"Due process requires that inmates receive fair notice of a rule before they can be sanctioned for its violation."[490] This rule does not apply if the conduct in question also violates

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[487] Keeling v. Schaefer, 181 F.Supp.2d 1206, 1224-25 (D.Kan. 2001) (restitution order must be supported by evidence of the amount required for restitution); Quick v. Jones, 754 F.2d 1521 (9th Cir. 1985) (inmate could not be sentenced to restitution for destroying property without findings that he destroyed it); Artway v. Scheidemantel, 671 F.Supp. 330 (D.N.J. 1987) (inmate could not be sentenced to restitution without a hearing that addressed the value of the property).

[488] *See, e.g.*, Pedraza v. Meyer, 919 F.2d 318, 320 (5th Cir. 1990) (prisoner could be disciplined for violating a rule against writing to other prisoners even though the other prisoner was his wife); Withrow v. Bartlett, 15 F.Supp.2d 292, 296-99 (W.D.N.Y. 1998) (prisoner could be disciplined for demonstrative praying in the yard contrary to prison rules); Leitzsey v. Coombe, 998 F.Supp. 282, 287 (W.D.N.Y. 1998) (upholding a rule prohibiting materials concerning any organization not approved by the Commissioner as applied to the prisoner's own organization).

[489] *See, e.g.*, Hargis v. Foster, 312 F.3d 404, 406 (9th Cir. 2002) (rule prohibiting "involvement in any disorderly conduct by coercing or attempting to coerce any unconstitutional action is not unconstitutional on its face, but as applied to a statement that an officer's actions could come up in pending litigation, it raised a material question whether it had a rational connection with security concerns or was an "exaggerated response"); Bradley v. Hall, 64 F.3d 1276, 1279-81 (9th Cir. 1995) (rule against "disrespect" could not be applied to statements in written grievances); Hancock v. Thalacker, 933 F.Supp. 1449, 1487-90 (N.D.Iowa 1996) (prisoners could be punished for false statements in grievances and other complaints to prison officials only if the statements were shown by a preponderance of the evidence to have been made with knowledge they were false).

[490] Forbes v. Trigg, 976 F.2d 308, 314 (7th Cir. 1992), *cert. denied*, 507 U.S. 950 (1993); *accord*, Coffman v. Trickey, 884 F.2d 1057, 1060 (8th Cir. 1989) (conviction for "knowingly failing to abide by any published institutional rule" denied due process where no institutional rule actually forbade the prisoner's conduct); Meis v. Gunter, 906 F.2d 364, 367 (8th Cir. 1990) (dictum); Frazier v. Coughlin, 850 F.2d 129, 130 (2d Cir. 1988); Robles v. Coughlin, 725 F.2d 12, 16 (2d Cir. 1983) and cases cited.

criminal statutes.[491]

A prison rule that is so vague that people of ordinary intelligence must guess at its meaning denies due process.[492] A rule may be vague "on its face," meaning that under no circumstances can it be applied constitutionally.[493] It may also be vague "as applied," meaning that it does not give adequate notice that it prohibits the conduct with which a particular prisoner is charged.[494]

Courts tolerate a greater degree of vagueness in prison rules than in criminal statutes.[495] For example, one court upheld a rule banning "derogatory or degrading remarks" against employees, "insults, unwarranted and uncalled for remarks, or other clearly intrusive verbal behavior" against employees on duty, and "unsolicited, non-threatening, abusive conversation,

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[491] Frazier v. Coughlin, 850 F.2d at 130.

[492] Rios v. Lane, 812 F.2d 1032, 1038 (7th Cir.); Soto v. City of Sacramento, 567 F.Supp. 662, 684-85 (E.D.Calif. 1983) and cases cited.

[493] Noren v. Straw, 578 F.Supp. 1, 6 (D.Mont. 1982) (rule requiring inmates to act in an "orderly, decent manner with respect for the rights of the other inmates" was vague; new rules required); Jenkins v. Werger, 564 F.Supp. 806, 807-08 (D.Wyo. 1983) (statute barring "unruly or disorderly" conduct was void for vagueness).

[494] Gayle v. Gonyea, 313 F.3d 677, 680 n.3 (2d Cir. 2002) (questioning whether a rule forbidding work stoppages, sit-ins, lock-ins or "other actions which may be detrimental to the order of the facility" gave adequate notice that circulating petitions or encouraging others to file grievances is barred); Chatin v. Coombe, 186 F.3d 82, 86-87 (2d Cir. 1999) (holding that rule against unauthorized religious services was vague as applied to performing silent prayer in the prison yard); Newell v. Sauser, 79 F.3d 115, 118 (9th Cir. 1995) (rule against possessing anything not authorized or issued by the facility could not be applied to law librarian in possession of legal work prepared for other inmates, since as law librarian he was authorized to possess it); Wolfel v. Morris, 972 F.2d 712, 717-18 (6th Cir. 1992) (rule barring unauthorized group organizing was vague as applied to circulating a petition); Rios v. Lane, 812 F.2d at 1038-39 ("gang activity" rule was vague as applied to plaintiff's conduct); Smith v. Rowe, 761 F.2d 360, 364 (7th Cir. 1985) (contraband rule vague as applied); Adams v. Gunnell, 729 F.2d 362, 369 (5th Cir. 1984) (rule prohibiting "disruptive conduct" did not give adequate notice as applied); Gee v. Ruettgers, 872 F.Supp. 915, 920 (D.Wyo. 1994) (prohibition on providing "false information to any official, court, news media, penitentiary employee, or the general public" is not unconstitutionally vague on its face, but was vague as applied to letters to a prisoner's immediate family).

[495] Fichtner v. Iowa State Penitentiary, 285 N.W.2d 751, 759 (Iowa 1979). *But see* Chatin v. Coombe, 186 F.3d 82, 86-87 (2d Cir. 1999) (holding that a prison rule carried penalties "more akin to criminal rather than civil penalties," calling for close scrutiny of rule for vagueness).

correspondence or phone calls" to employees.[496]

2. Administrative segregation[497]

Administrative segregation requires due process protections if it causes an "atypical and significant hardship" and if state statutes and regulations create a liberty interest, either in staying out of it[498] or in avoiding prolonged retention in it.[499]

The Supreme Court said in *Hewitt v. Helms* that less procedural protection is required for administrative segregation than for disciplinary hearings, in part because the Court thought it was not "of great consequence" because the prisoner is already in a restricted environment in prison, there was no "stigma of wrongdoing or misconduct" involved, and there was no indication it would affect parole opportunities.[500] Also, putting someone in administrative segregation "turns largely on 'purely subjective evaluations and on predictions of future behavior'" and on "intuitive judgments" that "would not be appreciably fostered by the trial-type procedural safeguards" of disciplinary hearings.[501] So due process requires only "an informal nonadversary review of the information supporting [the prisoner's] administrative

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[496] Gibbs v. King, 779 F.2d 1040, 1045-46 (5th Cir.); *see* Gaston v. Taylor, 946 F.2d 340, 342 (4th Cir. 1991) (en banc) (rule barring possession of "anything not specifically approved for the specific inmate who has possession of the item" was not unconstitutional); Landman v. Royster, 333 F.Supp. 621, 655-56 (E.D.Va. 1971) (striking down rules against "misbehavior," "misconduct," and "agitation," but upholding rules against insolence, harassment, and insubordination).

[497] Administrative segregation is used here to mean segregation that is supposedly not punitive but is imposed pending investigation of misconduct charges, to prevent future misconduct or other violations of security and order, or to protect the person who is segregated, or while a prisoner is awaiting transfer or classification. Sometimes different names are used: "maximum security," "involuntary protective admission," "close custody," etc. To compound the confusion, in some systems, administrative segregation is used to denote disciplinary segregation.

[498] *See* Magluta v. Samples, 375 F.3d 1269, 1279-83 (11th Cir. 2004) (holding federal prisoner who alleged he spent more than 500 days under "extremely harsh" segregation conditions sufficiently alleged had a liberty interest in avoiding administrative segregation).

[499] *See* Tellier v. Fields, 280 F.3d 69, 82 (2d Cir. 2000) (analyzing federal prison regulations).

[500] Hewitt v. Helms, 459 U.S. 460, 473 (1983).

[501] *Id.* at 474; *accord*, Toussaint v. McCarthy, 801 F.2d 1080, 1100 (9th Cir. 1986), *cert. denied*, 481 U.S. 1069 (1987)

confinement."[502]

The Supreme Court has accepted for review a case that presents the question whether severely isolating, indefinite "supermax" confinement is governed by the *Hewitt* due process holding or whether a higher due process standard is required.[503]

This "informal nonadversary review" requires "some notice of the charges."[504] The Second Circuit has held in an administrative segregation case that due process requires "a notice that is something more than a mere formality. . . . The effect of the notice should be to compel 'the charging officer to be [sufficiently] specific as to the misconduct with which the inmate is charged" to inform the inmate of what is is accused of doing so that he can prepare a defense to those charges and not be made to explain away vague charges set out in a misbehavior report."[505]

Due process also requires "an opportunity [for the prisoner] to present his views" to the

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[502] Hewitt v. Helms, 459 U.S. at 472; *accord*, Banks v. Fauver, 801 F.Supp. 1422, 1430-31 (D.N.J. 1992).

[503] *See* Austin v. Wilkinson, 372 F.3d 346 (6th Cir.), *cert. granted*, 125 S.Ct. 686 (2004).

[504] Hewitt v. Helms, 459 U.S. at 476; *see* Brown v. Plaut, 131 F.3d 163, 171 n.9 (D.C. Cir. 1997) (holding that notice need not be in advance of the hearing), *cert. denied*, 524 U.S. 939 (1998); Matiyn v. Henderson, 841 F.2d 31, 36 (2d Cir.) (lack of notice would deny due process), *cert. denied*, 487 U.S. 1220 (1988).

[505] Taylor v. Rodriguez, 238 F.3d 188, 192-93 (2d Cir. 2001) (holding that a notice referring only to "past admission to outside law enforcement," "recent tension . . . involving gang activity," and "statements by independent confidential informants" was too vague; officials must provide specific allegations of conduct involving current gang involvement); *accord*, Austin v. Wilkinson, 372 F.3d 346, 359 (6th Cir.) (affirming requirement of a complete statement of reasons for placement and summary of evidence to be presented), *cert. granted*, 125 S.Ct. 686 (2004); Brown v. Plaut, 131 F.3d at 172 ("If Brown was not provided an accurate picture of what was at stake in the hearing, then he was not given his due process."); Brown v. District of Columbia, 66 F.Supp.2d 41, 45 (D.D.C. 1999) (holding that prisoner who did not get notice before or during his hearing of the alleged misconduct for which he was to be segregated "was not afforded the most basic process–an opportunity to know the basis on which a decision will be made and to present his views on that issue or issues"). Earlier decisions suggested that this notice may be less formal and detailed than the notice required for disciplinary charges. *See* Stringfellow v. Perry, 869 F.2d 1140, 1142-43 (8th Cir. 1989) (statements that "more extensive investigation" was needed were sufficient); Toussaint v. McCarthy, 801 F.2d 1080, 1100-01 (9th Cir. 1986) ("detailed written notice of charges" is not required), *cert. denied*, 481 U.S. 1069 (1987).

decision-maker, orally or in writing.[506] Prisoners must be able to present their views directly to the person who actually makes the decision.[507] This must occur "within a reasonable time" after the confinement.[508] What is "reasonable" depends on the reason for delay.[509]

Once in administrative segregation, prisoners are entitled to "some sort of periodic review"–which need not involve new evidence or statements–to determine if there is a need for continued segregation.[510] The courts have not pinpointed how often this review must be conducted. One court has held that every 120 days is sufficient.[511] Others have held that intervals of around a month are adequate[512] but intervals approaching a year deny due process.[513]

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[506] Hewitt v. Helms, 459 U.S. at 476; Jackson v. Cain, 864 F.2d 1235, 1252 (5th Cir. 1989).

[507] Hatch v. District of Columbia, 184 F.3d 846, 852 (D.C.Cir. 1999) (holding that prisoner who was not allowed to attend his hearing and had an exchange of letters with other prison officials had not had an opportunity to present his views to the decision-maker); Toussaint v. McCarthy, 926 F.2d 800, 803 (9th Cir. 1990); Gittens v. LeFevre, 891 F.2d 38, 41-42 (2d Cir. 1989).

[508] Hewitt v. Helms, 459 U.S. at 472.

[509] Hatch v. District of Columbia, 184 F.3d 846, 852 (D.C.Cir. 1999) (holding an exchange of letters between prison officials, seven weeks after initial placement, was not "a reasonable time following his transfer"); Layton v. Beyer, 953 F.2d 839, 850-51 (3d Cir. 1992) (20 days might be unreasonable depending on the justification); Russell v. Coughlin, 910 F.2d 75, 78 (2d Cir. 1990) (ten days' delay with no explanation except inadvertence was not reasonable); Matiyn v. Henderson, 841 F.2d at 36 (confinement for four days with no hearing denied due process; state regulation providing for no hearing for those held less than 14 days would be unconstitutional); Sourbeer v. Robinson, 791 F.2d 1094, 1100 (3d Cir. 1986) (35 days presents a "close question" but is approved), *cert. denied*, 483 U.S. 1032 (1987); Hayes v. Lockhart, 754 F.2d 281 (8th Cir. 1985) (15-day delay approved).

[510] Hewitt v. Helms, 459 U.S. at 477 n. 9.

[511] Toussaint v. McCarthy, 926 F.2d at 803; *see* Smith v. Shettle, 946 F.2d 1250, 1255 (7th Cir. 1991) (30-day intervals are not constitutionally required). *But see* Hatori v. Haga, 751 F.Supp. 1401, 1407-08 (D.Haw. 1989) (30-day review required in conformity with defendants' own regulations).

[512] Rahman X v. Morgan, 300 F.3d 970, 974 (8th Cir. 2002) (holding 60-day review adequate); Luken v. Scott, 71F.3d 192 (5th Cir. 1995) (holding 90-day review adequate); Garza v. Carlson, 877 F.2d 14, 17 (8th Cir. 1989) (monthly reviews upheld); Clark v. Brewer, 776 F.2d 226, 234 (8th Cir. 1985) (weekly hearings for two months and monthly hearings thereafter upheld); Mims v. Shapp, 744 F.2d 946, 952-54 (3d Cir. 1984) (30-day review adequate).

[513] McQueen v. Tabah, 839 F.2d 1525, 1529 (11th Cir. 1988) (11 months without review stated a due process claim); Toussaint v. McCarthy, 801 F.2d at 1101 (12 months without review denied

Review must be meaningful; due process is not satisfied by perfunctory review and rote reiteration of stale justifications.[514] Prison officials should give notice if new evidence is to be presented at review hearings or if the hearings are not conducted on a regular and frequent schedule.[515]

The Court in *Hewitt* did not say anything about written dispositions or about impartial decision-makers. Some earlier decisions have held that statements of reasons are not required by due process, but the most decision examining the question says the opposite.[516] In my view statements of reasons should be required at least for review hearings. Otherwise, it is impossible to determine whether a prisoner's continuing confinement is based on a continuing justification or whether it is just the "rote reiteration of stale justifications" that courts have condemned.[517] The courts have not resolved whether an impartial decisionmaker is required.[518]

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due process).

[514] Sourbeer v. Robinson, 791 F.2d at 1101; McClary v. Kelly, 87 F.Supp.2d 205, 214 (W.D.N.Y. 2000) (stating that review must be "'meaningful' and not a sham or fraud," upholding damage verdict for sham review), *aff'd*, 237 F.3d 185 (2d Cir. 2001); Giano v. Kelly, 869 F.Supp. 143, 150 (W.D.N.Y. 1994) (stating that "prison officials must be prepared to offer evidence that the periodic reviews held are substantive and legitimate, not merely a 'sham'"); *see* Thompson-El v. Jones, 876 F.2d 66, 69 n. 6 (8th Cir. 1989) (dictum) (a claim that there was an "ongoing investigation" might not justify six months' segregation when there was little or no actual investigation going on). *But see* Edmonson v. Coughlin, 21 F.Supp.2d 242, 253 (W.D.N.Y. 1998) ("The fact that the ASRC repeated the same rationale each week, and did not enable Edmonson to submit information is not a basis for finding that the ASRC violated due process"; though the process should have been "better documented," it need not be "formalized").

[515] Clark v. Brewer, 776 F.2d at 234.

[516] *Compare* Toussaint v. McCarthy, 801 F.2d at 1101; Jones v. Moran, 900 F.Supp. 1267 (N.D.Cal. 1995) *with* Austin v. Wilkinson, 189 F.Supp.2d 719, 746 (N.D.Ohio 2002), *injunction entered*, 204 F.Supp.2d 1024 (N.D.Ohio 2002), *aff'd in pertinent part*, 372 F.3d 346, 360 (6th Cir.), *cert. granted*, 125 S.Ct. 686 (2004).

[517] Sourbeer v. Robinson, 791 F.2d at 1104; *see* Sheley v. Dugger, 833 F.2d 1420, 1427 (11th Cir. 1987) (hearing ordered to determine if there was continuing justification for twelve-year confinement); *cf.* Wolff v. McDonnell, 418 U.S. 539, 565 (1974) (explaining the need for written records).

[518] *See* Shoats v. Horn, 213 F.3d 140, 146 (3d Cir. 2000) (rejecting claim of bias because there were many decision-makers who all reached the same conclusion; not deciding whether an impartial fact-finder is required); Woods v. Edwards, 51 F.3d 577, 582 (5th Cir. 1995) (noting lack of evidence to support claim of biased periodic review, not stating whether an impartial fact-finder is required);

In making segregation decisions, the Supreme Court said that prison officials may consider "the character of the inmates confined in the institution, recent and longstanding relations between prisoners and guards, prisoners *inter se* [among themselves], and the like . . .; rumor, reputation, and even more imponderable factors . . . 'purely subjective evaluations' . . . intuitive judgments."[519] In practice, common reasons include pending disciplinary charges,[520] risk of escape or other security threats,[521] involvement in gangs or other "security threat groups,"[522] and protection of the segregated inmate.[523] Prison officials' reasons deny due process only if they are clearly arbitrary or the segregation is clearly excessive.[524] Some courts have suggested that as the length of segregation increases, prison officials' burden of justification for continued segregation increases.[525]

In recent years some courts have demanded a somewhat higher level of justification and process than did early interpretations of *Hewitt v. Helms.* Thus, the Second Circuit has applied

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Parenti v. Ponte, 727 F.2d 21, 25 (1st Cir. 1984) (Classification Board members whose recommendations were nonbinding did not have to be impartial); Gomez v. Coughlin, 685 F.Supp. 1291, 1297 (S.D.N.Y. 1988) (due process may require a decisionmaker with an "open mind").

[519] Hewitt v. Helms, 459 U.S. at 474 (citations omitted); *accord*, Shoats v. Horn, 213 F.3d 140, 146 (3d Cir. 2000) (holding prison officials' conclusion that plaintiff was a current threat to security and good order justified retention in segregation); Mims v. Shapp, 744 F.2d 946, 952-53 (3d Cir. 1984); Crosby-Bey v. District of Columbia, 598 F.Supp. 270 (D.D.C. 1984) (prisoner could be segregated because of injuries suggesting he had been in a fight).

[520] Russell v. Coughlin, 910 F.2d 75, 77-78 (2d Cir. 1990).

[521] *See, e.g.*, Toussaint v. McCarthy, 926 F.2d at 802 (continuing gang affiliation); Martin v. Tyson, 845 F.2d 1451, 1457 (5th Cir.) (escape risk), *cert. denied*, 488 U.S. 863 (1988).

[522] Taylor v. Rodriguez, 238 F.3d 188 (2d Cir. 2001).

[523] *See, e.g.*, Meriwether v. Faulkner, 821 F.2d 408, 416 (7th Cir.) (transsexual prisoner segregated for own protection), *cert. denied*, 484 U.S. 935 (1987); Golub v. Coughlin, 885 F.Supp. 42 (N.D.N.Y. 1995) (holding that a charge for a heinous murder was sufficient reason to keep a prisoner in involuntary protective custody).

[524] *See* Clark v. Brewer, 776 F.2d at 234-35 (fear of adverse staff or inmate reaction may be considered, but the mere possibility of such reaction cannot by itself justify segregation); Perez v. Neubert, 611 F.Supp. 830, 839-40 (D.N.J. 1985) (defendants could not continue the segregation of all "Marielito" prisoners based only on their group membership).

[525] Sheley v. Dugger, 833 F.2d at 1427 (allegation of 10-year segregation with no new information stated a due process claim); Meriwether v. Faulkner, 821 F.2d at 416 (protracted segregation unrelated to misconduct presents "a very difficult question"); Mims v. Shapp, 744 F.2d at 951-52.

the same requirement of "reliable" evidence to administrative segregation decisions that it and other courts have applied to disciplinary proceedings.[526] That holding may seem to contrast with the Supreme Court's endorsement of "rumor, reputation, . . . [and] intuitive judgments" as a basis for segregation.[527] On the other hand, prison officials' action in *Taylor* did not rest on some subjective predictive judgment but on the supposed fact that the prisoner was a gang member, as shown by his actions and other evidence–a determination that appears appropriately served by fact-finding procedures. Other courts have held that in cases of indefinite confinement under "supermax" isolation conditions, the stakes are so high that greater protections are required. Thus, one court held that such confinement was so restrictive and imposed for such long and indefinite periods that the greater procedural requirements of *Wolff v. McDonnell* were required; the appeals court affirmed, stating: "It is not enough to say that a particular decision is 'forward-looking'; instead reference must be made to the interests at stake, for the inmate and for the state."[528]

3. Temporary Release

Some courts hold that if there is a liberty interest in staying on temporary release, revocation proceedings need only meet the due process standards of prison disciplinary hearings.[529] Others have held that the higher standards of parole or probation revocation

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[526] Taylor v. Rodriguez, 238 F.3d 188, 194 (2d Cir. 2001) (holding requirement not met by confidential informant information not supported by any indicia of reliability); *accord*, Ryan v. Sargent, 969 F.2d 638, 640-41 (8th Cir. 1992) (use of confidential informant information requires the same safeguards of reliability as in disciplinary cases), *cert. denied*, 506 U.S. 1061 (1993); Jackson v. Bostick, 760 F.Supp. 524, 530-31 (D.Md. 1991) (substantive due process requires an independent determination based on reliable information before a prisoner can be segregated as an escape risk); *see* United States v. Gotti, 755 F.Supp. 1159, 1164 (E.D.N.Y. 1991) ("subjective belief' of what was in a detainee's mind, without more" did not justify administrative detention).

[527] Hewitt v. Helms, 459 U.S. at 474.

[528] Austin v. Wilkinson, 372 F.3d 346, 357 (6th Cir. 2004), *aff'g* 189 F.Supp.2d 719, 743-45 (N.D.Ohio 2002), *injunction entered*, 204 F.Supp.2d 1024 (N.D. Ohio 2002), *cert. granted*, 125 S.Ct. 686 (2004).; *see* Koch v. Lewis, 216 F.Supp.2d 994, 1003 (D.Ariz. 2001), *appeal dismissed as moot*, 335 F.3d 993 (9th Cir. 2003) (holding that confinement in supermax unit required evidence with sufficient "indicia of reliability" to justify indefinite confinement, and that actions and not mere membership in a gang must be shown to justify indefinite confinement). *Austin*, however, rejected the *Koch* holding that mere membership in a gang cannot be the basis for indefinite segregation. 372 F.3d at 356.

[529] See Lanier v. Fair, 876 F.2d 243, 248-49 (1st Cir. 1989); Brennan v. Cunningham, 813 F.2d 1, 8-9 (1st Cir. 1987); Tracy v. Salamack, 572 F.2d 393, 397 (2d Cir. 1978).

"logically apply."[530] Arguably, the latter conclusion is compelled by *Young v. Harper*, which analogized a "pre-parole" program to parole, reasoning which some courts have held applicable to non-institutional temporary release programs.[531] Violation of state law protections that exceed federal due process requirements does not deny due process.[532]

4. Property

Prisoners' property can be severely restricted, but when they are allowed to possess property in prison, their rights cannot be infringed without due process.[533] However, most

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[530] Friedl v. City of New York, 210 F.3d 79, 84-85 (2d Cir. 2000); *accord*, Edwards v. Lockhart, 908 F.2d 299, 303 (8th Cir. 1990) (parole revocation procedures were required to revoke temporary release in which the plaintiff lived at home); Smith v. Stoner, 594 F.Supp. 1091, 1107 (N.D.Ind. 1984) (parole revocation procedures required).

The relevant requirements are "(a) written notice of the claimed violations of parole; (b) disclosure to the parolee of evidence against him; (c) opportunity to be heard in person and to present . . . evidence; (d) the right to confront and cross-examine adverse witnesses . . .; (e) a 'neutral and detached' hearing body such as a traditional parole board . . .; and (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking parole." *Morrissey v. Brewer*, 408 U.S. 471, 489 (1972), *quoted in Friedl*, 210 F.3d 84-85. *Friedl* further held that revocation of temporary release must be supported by some evidence in the record of the alleged violation. *Id.; see also* Quartararo v. Hoy, 113 F.Supp.2d 405, 412-13 (E.D.N.Y. 2000) (requiring "a statement of the *actual* reason why the inmate's removal from work release is being considered" and "a post-hearing written account of the *actual* reason for removal and a summary of the evidence supporting that reason").

[531] *See* nn. 347-48, above.

[532] Holcomb v. Lykens, 337 F.3d 217, 224 (2d Cir. 2004).

[533] McCrae v. Hankins, 720 F.2d 863, 869 (5th Cir. 1983). Some courts have said that contraband can be seized without due process because prisoners have no property interest in it. *See, e.g.*, Lyon v. Farrier, 730 F.3d 525, 527 (8th Cir. 1984). That holding misses the point, which is that there should be a right to be heard on whether the item *is* contraband. Stewart v. McGinnis, 5 F.3d 1031, 1037 (7th Cir. 1993), *cert. denied*, 510 U.S. 1121 (1994); Farid v. Smith, 850 F.2d at 925 (evidence that prison officials made prisoners send alleged contraband out of the prison immediately and denied their subsequent grievances raised a factual question whether due process was violated); U.S. ex rel. Wolfish v. Levi, 439 F.Supp. 114, 151 (S.D.N.Y. 1977), *aff'd in pertinent part*, 573 F.2d 118, 131-32 n. 29 (2d Cir. 1978), *rev'd on other grounds sub nom.* Bell v. Wolfish, 441 U.S. 520 (1979).

The decision in *Sandin v. Conner*, 515 U.S. 472 (1995), addresses prisoners' liberty interests and does not address due process analysis in property cases. Bulger v. United States Bureau of

prisoner property deprivations are not litigable in federal court because of the rule that post-deprivation process suffices for "random and unauthorized" deprivations of property.[534] That means if the state provides a tort remedy, there is no federal claim.[535] Deprivations that are not random and unauthorized, but represent authorized or established procedures or policy, do require further due process protections.[536]

Courts have held that prison officials are required to give receipts for property intentionally seized, a statement of reasons for the seizure, the right to be heard in opposition, and a decision with reasons if the seizure is upheld,[537] which may be afforded at a disciplinary hearing on contraband charges.[538]

It is not generally a deprivation of property for prison officials to withdraw permission to possess property as long as the prisoner has an opportunity to send it to someone outside the prison.[539] However, prison officials concerned with security are allowed to take the property first and deal with prisoners' procedural rights later.[540]

Many prisoners are subject to actions for forfeiture of property allegedly related to their

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Prisons, 65 F.3d 48, 50 (5th Cir. 1995).

[534] Hudson v. Palmer, 468 U.S. 517, 533-35 (1984).

[535] Jackson v. Burke, 256 F.3d 93 (2d Cir. 2001).

[536] Logan v. Zimmerman Brush Co., 455 U.S. 422, 436 (1982); Farid v. Smith, 850 F.2d 917, 925 (2d Cir. 1988). For example, searches and shakedowns conducted pursuant to regulations or to the orders of responsible officials are considered authorized or established. Caldwell v. Miller, 790 F.2d 589, 608 (7th Cir. 1986).

[537] U.S. ex rel. Wolfish v. Levi, 428 F.Supp. 333, 342 (S.D.N.Y. 1977), *supplemented*, 439 F.Supp. 114, 151 (S.D.N.Y. 1977), *aff'd in pertinent part*, 573 F.2d 118, 131-32 n. 29 (2d Cir. 1978), *rev'd on other grounds sub nom.* Bell v. Wolfish, 441 U.S. 520 (1979); Steinberg v. Taylor, 500 F.Supp. 477, 479-80 (D.Conn. 1980).

[538] Stewart v. McGinnis, 5 F.3d 1031, 1037 (7th Cir. 1993), *cert. denied*, 510 U.S. 1121 (1994). *Stewart* held that failure to provide a receipt did not deny due process because it was a deviation from the prison's established policy. 5 F.3d at 1036. I think that conclusion is mistaken. The question is whether the *seizure* was authorized, not whether the officer followed all the rules in carrying it out.

[539] Caldwell v. Miller, 790 F.2d at 609; Lyon v. Farrier, 730 F.2d 525, 527 (8th Cir. 1984).

[540] Beck v. Lynaugh, 842 F.2d 759, 761 (5th Cir. 1988) (immersion heaters that presented a fire hazard could be confiscated without a prior hearing); Caldwell v. Miller, 790 F.2d at 608-09.

criminal behavior, and there is a recurrent problem of their failure to receive notice of the proceedings. The Supreme Court has held that notice need not actually be received by the prisoner as long as it is sent to the place where the prisoner is held.[541]

Money is obviously property and protected by due process.[542] If state law or federal statute or regulation creates a right to be paid for prison work, that right is protected by due process,[543] subject to limitations in the governing state law.[544] However, cash is contraband in most prisons, and courts have differed over whether prison officials may just confiscate it[545] or if statutory authorization is required.[546] There is an ongoing controversy under both the Due Process Clauses and the Takings Clause over whether interest earned on prisoners' money must be paid to the prisoners; the Eleventh Circuit has held it need not.[547]

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[541] Dusenberry v. U.S., 534 U.S. 161 (2002); *see* Chairez v. U.S., 355 F.3d 1099, 1101-02 (7th Cir. 2004) (applying *Dusenberry*, declining to inquire into operation of jail's internal mail delivery), *cert. denied*, 125 S.Ct. 37 (2004). *Compare* U.S. v. Howell, 354 F.3d 693, 696 (7th Cir.) (holding that sending notice to two addresses, one of which was known to be vacant, resulting in both notices' being returned undelivered, while failing to send the notice to the address on the prisoner's driver's license or to the Minnesota jail where he was known to be held, was not adequate), *cert. denied*, 125 S.Ct. 189 (2004).

[542] Alexanian v. New York State Urban Development Corp., 554 F.2d 15, 17 (2d Cir. 1977).

[543] Gilbreath v. Cutter Biological, Inc., 931 F.2d 1320, 1327 (9thCir. 1991).

[544] Allen v. Cuomo, 100 F.3d 253 261 (2d Cir. 1996) (holding prison officials could impose a "pay lag" procedure because the governing statutes gave them great discretion over prisoners' pay); James v. Quinlan, 866 F.2d 627, 630 (3d Cir. 1989) (upholding regulation requiring prisoners to assign half their money to pay court-ordered obligations or lose their prison industries jobs), *cert. denied*, 493 U.S. 870 (1989); Hrbek v. Farrier, 787 F.2d 414, 416-17 (8th Cir. 1986).

[545] Best v. State, 736 P.2d 171, 172 (Okla.App. 1987).

[546] Sell v. Parratt, 548 F.2d 753, 758 (8th Cir.), *cert. denied*, 434 U.S. 873 (1977); *see* Allen v. Cuomo, 100 F.3d 253, 260 (2d Cir. 1996) (finding statutory authorization based on state court construction of Commissioner's authority).

[547] Givens v. Alabama Dep't of Corrections, 381 F.3d 1064 (11th Cir. 2004). The court held that the usual "interest follows principal" rule does not apply to prisoners because traditionally prisoners had *no* property rights, their control over their inmate accounts is limited, and the statutes and regulations governing prisoner compensation do not explicitly address interest. *Accord*, Washlefske v. Winston, 234 F.3d 179, 185 (4th Cir. 2000). Both *Givens* and *Washlefske* address money paid to prisoners for their labor. Whether their rationale would extend to money from other sources is an open question. *Compare* Vance v. Barrett, 343 F.3d 1083 (9th Cir. 2003) (holding that prisoners' interest is their property; deprivations pursuant to statute present Takings Clause issues

Prison officials may not simply take money out of a prisoner's account without notice or hearing, but the process due will depend on context. If restitution is ordered as a disciplinary measure, the disciplinary hearing must address the relevant issues.[548] Other non-routine deductions may also require notice and hearing.[549] However, for deductions in the ordinary course of business, due process is satisfied by providing a complete account statement.[550]

IV. Access to Courts

Prisoners have a right of access to courts,[551] which extends to all categories of prisoners[552] and it is supposed to be "adequate, effective, and meaningful."[553] The right of court

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and deprivations without statutory authorization present due process questions); McIntyre v. Bayer, 339 F.3d 1097 (9th Cir. 2003) (holding that interest income is property but need be paid only to individuals whose share of the total pooled interest is greater than the costs of administering the account); *see* Allen v. Cuomo, 100 F.3d 253 (2d Cir. 1996) (holding that two-week "pay lag" did not violate Takings Clause based on impact on interest earnings).

[548] Quick v. Jones, 754 F.2d 1521 (9th Cir. 1985) (holding restitution sentence for destroyed property must be supported by findings that the inmate actually destroyed it); Artway v. Scheidemantel, 671 F.Supp. 330, 337 (D.N.J. 1987) (holding restitution sentence must be supported by a hearing addressing the value of the property); *see* Allen v. Cuomo, 100 F.3d 253, 259-60 (2d Cir. 1996) (upholding $5.00 surcharge on disciplinary convictions).

[549] Wojnicz v. Department of Corrections, 32 Mich.App. 121, 188 N.W.2d 251, 253-54 (Mich.App. 1971).

[550] Jensen v. Klecker, 648 F.2d 1179, 1183 (8th Cir. 1981); *see* Reynolds v. Wagner, 128 F.3d 166, 179 (3d Cir. 1997) (holding that due process was satisfied by notice of a policy of charging for medical appointments and providing a post-deduction grievance procedure).

[551] Despite its importance, the courts aren't too clear about where this right comes from; they have cited the Privileges and Immunities Clause of Article IV of the Constitution, the First Amendment Petition Clause, the Fifth Amendment Due Process Clause, and the Fourteenth Amendment Equal Protection and Due Process Clauses. Christopher v. Harbury, 536 U.S. 403, 415 n.12 (2002); *accord*, Chappell v. Rich, 340 F.3d 1279, 1282 (11th Cir. 2003) (per curiam) (non-prisoner case), *cert. denied*, 540 U.S. 1219 (2004).

[552] *See* John L. v. Adams, 969 F.2d 228, 232-33 (6th Cir. 1992) and cases cited (juvenile prisoners); Hatch v. Yamauchi, 809 F.Supp. 59, 61 (E.D.Ark. 1992) (prisoners held in a mental hospital); Murray v. Didario, 762 F.Supp. 109, 109-10 (E.D.Pa. 1991) (prisoners held in a mental hospital); Orantes-Hernandez v. Smith, 541 F.Supp. 351, 384 (C.D.Cal. 1982) (immigration detainees); *see also* Ward v. Kort, 762 F.2d 856, 858 (10th Cir. 1985) (civilly committed mental

access in civil cases is distinct from the right of indigent persons to have lawyers appointed for their defense under the Sixth Amendment and the Due Process Clause. This constitutional right to appointed counsel is mostly limited to criminal trial and appellate proceedings,[554] and to civil proceedings that may deprive a non-prisoner of liberty or other interests of compelling importance.[555]

A. Types of court access claims

Court access claims fall into three broad categories, as follows:

1. The right to assistance in bringing legal claims

The Supreme Court held in *Bounds v. Smith* that prison authorities have an affirmative obligation to "*assist* inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law."[556] It has also held that "indigent inmates must be provided at state expense with paper and pen to draft legal documents, with notarial services to authenticate them, and with stamps to mail them."[557] However, in *Lewis v. Casey*, the Supreme Court imposed several restrictions on prisoners' ability to enforce the *Bounds v. Smith* obligation. *Lewis* held that a prisoner complaining of a *Bounds* violation must show that:

1. he was, or is, suffering "actual injury" by being, "frustrated or impeded"[558]

2. in bringing a non-frivolous claim[559]

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patients).

[553] Bounds v. Smith, 430 U.S. 817, 822 (1977).

[554] *See* Murray v. Giarratano, 492 U.S. 1, 7 (1989).

[555] *See* Lassiter v. Dep't of Social Services, 452 U.S. 18, 32-33 (1981) (holding counsel is not required in all proceedings to terminate parental rights).

[556] Bounds v. Smith, 430 U.S. 817, 828 (1977) (emphasis supplied).

[557] *Bounds*, 430 U.S. at 824-25 (1977).

[558] Lewis v. Casey, 518 U.S. 343, 351-53 (1996).

[559] *Id.*

3. about his criminal conviction or sentence or the conditions of his confinement.[560]

The following subsections address each of these requirements in turn, as well as other aspects of *Lewis*.

a. The "actual injury" requirement

Lewis v. Casey says it is not enough for prisoners to show that prison officials do not provide adequate law libraries, legal assistance, or legal supplies, or that they impose unreasonable restrictions on prisoners who try to use them. Prisoners must show that the inadequacies or restrictions caused them "actual injury," *i.e.*, "that a nonfrivolous legal claim had been frustrated or was being impeded."[561] The large majority of prisoner court access claims that I see are dismissed for failure to allege actual injury or to provide factual support for it.

Exactly what "frustrated or impeded" means is not completely clear. *Lewis* gave two examples:

> [The inmate] might show, for example, that a complaint he prepared was dismissed for failure to satisfy some technical requirement which, because of deficiencies in the prison's legal assistance facilities, he could not have known. Or that he had suffered arguably actionable harm that he wished to bring before the courts, but was so stymied by inadequacies of the law library that he was unable even to file a complaint.[562]

Some courts seem to assume that the prisoner's case must be dismissed, or prevented from being filed, in order to be "frustrated or impeded."[563] Others assume that obstacles that impair the

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[560] *Lewis*, 518 U.S. at 355.

[561] *Lewis*, 518 U.S. at 351-53; *see* Akins v. United States, 204 F.3d 1086, 1090 (11th Cir.) ("The mere inability of a prisoner to access the law library is not, in itself, an unconstitutional impediment. The inmate must show that this inability caused an actual harm. . . ."), *cert. denied*, 531 U.S. 971 (2000).

[562] *Lewis*, 518 U.S. at 351; *see* Davis v. Milwaukee County, 225 F.Supp.2d 967, 976-77 (E.D.Wis. 2002) (holding that a prisoner whose case was dismissed for failure to exhaust administrative remedies was denied access to courts because the jail lacked legal materials from which he could have learned about the exhaustion requirement, or materials about the jail grievance procedure).

[563] *See* Ingalls v. Florio, 968 F.Supp. 193, 203 (D.N.J. 1997); Smith v. Armstrong, 968 F.Supp. 40, 48-49 (D.Conn. 1996) (holding in class action that individuals who had managed to file complaints despite lack of assistance had not been injured); Stewart v. Sheahan, 1997 WL 392073

ability to present one's case effectively are also actionable.[564] The latter view appears to be the correct one, since the Supreme Court said later that cases that were inadequately tried or settled, or where a particular kind of relief could not be sought, as a result of officials' actions, could amount to denials of court access, in addition to those that were dismissed or never filed.[565]

Courts have held generally that delay by itself is not sufficient injury to constitute a denial of court access,[566] though in my view that holding would be wrong in a case where the

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at *3 (N.D.Ill. 1997) ("If the judge ruled against him because Stewart did not have the resources to disabuse him of his misunderstanding of the law, this is a matter of effective argument, not inability to present a claim at all." The plaintiff alleged that he was denied access to authority that would have demonstrated that a state court had jurisdiction over his claim.)

[564] *See* Cody v. Weber, 256 F.3d 764, 768 (8th Cir. 2001) (holding the advantage defendants obtained by reading the plaintiff's private legal papers constituted actual injury); Goff v. Nix, 113 F.3d 887, 891 (8th Cir. 1997) (holding that inability of co-plaintiffs to coordinate recruitment of witnesses for trial "impeded" a non-frivolous claim, though upholding rule barring their correspondence under the *Turner* standard; holding that plaintiff who "lost papers critical to his post-conviction proceeding" was actually injured); King v. Barone, 1997 WL 337032 at *4 (E.D.Pa. 1997) (declining to dismiss claim based on confiscation of alleged exculpatory documentation since it is "conceivable" this may have impeded the plaintiff's petition for post-conviction relief); David v. Wingard, 958 F.Supp. 1244, 1256 (S.D.Ohio 1997) (lack of knowledge of court rules resulting from missing pages in law books, which allegedly resulted in dismissal of motion to reopen appeal, met injury requirement); *see also* Ortloff v. United States, 335 F.3d 652, 656 n.1 (7th Cir. 2003) (noting its pre-*Lewis v. Casey* holding that alleging "substantial and continuous limit on . . . access to legal materials or counsel . . . carries an inherent allegation of prejudice.") (dictum).

Other courts have explicitly rejected the notion that inability to present a case well constitutes injury. *See* Curtis v. Fairman, 1997 WL 159319 at *5 (N.D.Ill. 1997) (holding that denial of law library access to respond to a motion to dismiss is not actual injury because case citations and legal arguments are not absolutely necessary at this stage); Kain v. Bradley, 959 F.Supp. 463, 468 (M.D.Tenn. 1997) (holding that plaintiff's inability to discover a legal argument more successful than the one he made was not injury where he was able to submit some response to a motion).

[565] Christopher v. Harbury, 536 U.S. 403, 414, 416 n.13 (2002). *Christopher* was not a prison case, and it referred to a case which was "tried to an inadequate result due to missing or fabricated evidence in an official cover-up," rather than dismissed or not filed because of inadequate law library access or other prison shortcomings. But it cites *Lewis v. Casey* repeatedly, and its principles would seem to be applicable to prison cases governed by *Lewis.*

[566] Davis v. Goord, 320 F.3d 346, 352 (2d Cir. 2003); Johnson v. Barczak, 338 F.3d 771, 773 (7th Cir. 2003) ("But a delay becomes an injury only if it results in 'actual substantial prejudice to specific litigation.'") (citation omitted); Konigsberg v. LeFevre, 267 F.Supp.2d 255, 261 (N.D.N.Y. 2003) ("("Interferences that merely delay an inmate's ability to work on a pending action or to

delay resulted in a prisoner's spending unnecessary time in prison, in segregated confinement, or in unlawful conditions that timely court access would have remedied.[567] A claim that denial of access to courts caused a prisoner to be convicted or kept him from getting his conviction or sentence overturned is subject to the rule of *Heck v. Humphrey*,[568] which requires the plaintiff to exhaust state judicial remedies (or show that those remedies were not available) and then proceed via federal habeas corpus to get the conviction or sentence overturned before filing a civil suit.[569]

b. The non-frivolous claim requirement

To violate the right of court access, deficiencies in prison facilities or services must "frustrate or impede" a claim that is not frivolous.[570] That merely means the claim must be "arguable,"[571] not that the prisoner must prove he would have won the case.[572] The claim must be

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communicate with the courts does not rise to the level of a constitutional violation."); Griffin v. DeTella, 21 F.Supp.2d 843, 847 (N.D.Ill. 1998) ("Standing alone, delay and inconvenience to not rise to the level of a constitutional deficiency.")

[567] May v. Sheahan, 226 F.3d 876, 883 (7th Cir. 2000) (holding that a hospitalized pre-trial detainee's allegations that refusal to take him to court would result in delay in disposition resulting in longer incarceration, inability to seek lower bail, delay in other motions, and restricted attorney access met the actual injury requirement); Simpson v. Gallant, 231 F.Supp.2d 341, 348-49 (D.Me. 2002) (holding that restrictions that prevented plaintiff from making bail and proceeding with a scheduled trial stated a court access claim); Taylor v. Cox, 912 F.Supp. 140, 142, 144 (E.D.Pa. 1995) (holding allegation that seizure of legal materials resulted in an extra month's incarceration stated a court access claim)

[568] 512 U.S. 477 (1994); *see* § III.E, above.

[569] Hoard v. Reddy, 175 F.3d 531, 533 (7th Cir.) (denying injunction to make state court reopen a post-conviction proceeding), *cert. denied*, 528 U.S. 970 (1999) .

[570] Lewis v. Casey, 343 U.S. at 353. The *Bounds* right to assistance does not extend to frivolous cases. *Id.* at n.3.

[571] Lewis v. Casey, 343 U.S. at 353 n.3. A frivolous claim is defined as one that "lacks an arguable basis either in law or fact." Neitzke v. Williams, 490 U.S. 319, 325 (1989).

[572] Walters v. Edgar, 163 F.3d 430, 434-35 (7th Cir. 1998), *cert. denied*, 526 U.S. 1149 (1999); Gomez v. Vernon, 962 F.Supp. 1296, 1302 (D.Idaho 1997); *see* Bell v. Johnson, 308 F.3d 594, 607 (6th Cir. 2002) (holding that losing a case on summary judgment does not make it frivolous, and that it could be the basis of a court access claim).

described specifically enough so the court can tell if it is frivolous or not[573]–in fact, the prisoner must plead that claim, as well as the court access claim, in the complaint.[574]

c. The criminal sentence/conditions of confinement requirement

Lewis v. Casey says that the affirmative obligation to help prisoners bring lawsuits extends only to what prisoners need "in order to attack their sentences, directly or collaterally, and in order to challenge the conditions of their confinement. Impairment of any *other* litigating capacity is simply one of the incidental (and perfectly constitutional) consequences of conviction and incarceration."[575] Thus, prison officials need not provide assistance to prisoners with respect to child custody, divorce, suits against them by crime victims, civil suits for false arrest or other police misconduct, etc.[576]–though that doesn't mean prison officials can obstruct such claims or retaliate against prisoners who file them.[577] There is an open question whether prisoners have a right to law libraries or other assistance to pursue conditions of confinement cases based on state law.[578] It is also questionable whether the criminal sentence/prison conditions limitation applies to cases of interference and retaliation claims.[579]

d. The requirement to plead the claim that was "frustrated or impeded"

In *Christopher v. Harbury*, the Supreme Court said that the plaintiff must *plead* the

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[573] Tarpley v. Allen County, Ind., 312 F.3d 895, 899 (7th Cir. 2002) (holding a prisoner who provided no detail about the cases he was unable to bring did not state a court access claim); Moore v. Plaster, 266 F.3d 928, 933 (8th Cir. 2001) (rejecting court access claim because the plaintiff did not show his case was not frivolous), *cert. denied,* 535 1037 (2002).

[574] *See* § IV.A.1.d, above.

[575] Lewis v. Casey, 518 U.S. at 355.

[576] *See* Wilson v. Blankenship, 163 F.3d 1284, 1291 (11th Cir. 1998) (holding that there is no right to law library access for a civil forfeiture proceeding); Canell v. Multnomah County, 141 F.Supp.2d 1046, 1056 (D.Or. 2001) (finding no right to assistance for civil cases not involving conditions of confinement).

[577] *See* § IV.A.2-3, below.

[578] Arce v. Walker, 58 F.Supp.2d 39, 44 (W.D.N.Y. 1999); *see* Thaddeus-X v. Blatter, 175 F.3d 378, 403 (6th Cir. 1999) (en banc) (stating the right is limited to "direct appeal, collateral attack, and § 1983 civil rights actions").

[579] *See* § IV.A.2-3, below.

claim that allegedly was "frustrated or impeded."[580] It must "be described well enough to apply the 'nonfrivolous' test and to show that the 'arguable' nature of the underlying claim is more than hope."[581] The plaintiff must also describe any remedy that he was prevented from getting, and that he can only get now as part of your court access claim.[582] How these rules interact with the principle of leniency towards *pro se* pleadings has not been addressed.

e. Does the right to court access stop with the filing of a complaint?

Lewis contains statements that, some courts say, limits the requirement of law libraries or legal assistance to the initial preparation of complaints and petitions. What *Lewis* actually says is that the right of court access is the right to "bring to court a grievance that the inmate wishe[s] to present"; the government need not "enable the prisoner to *discover* grievances" or "to *litigate effectively* once in court."[583] Some courts have held that this means the right of court access is only a "right of initial access to commence a lawsuit."[584]

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[580] 536 U.S. 403, 415-16 (2003).

[581] *Id.* at 416. *But see* Thomson v. Washington, 362 F.3d 969, 970-71 (7th Cir. 2004) (holding failure to identify the allegedly thwarted lawsuits did not support dismissal. "Federal judges are forbidden to supplement the federal rules for requiring 'heightened' pleading of claims not listed in Rule 9.")

[582] *Id.*

[583] *Lewis*, 343 U.S. at 354.

[584] Benjamin v. Jacobson, 935 F.Supp. 332, 352 (S.D.N.Y. 1996), *aff'd in part, rev'd in part and remanded on other grounds*, 172 F.3d 144 (2d Cir. 1999) (en banc), *cert. denied*, 528 U.S. 824 (1999); *accord*, Zigmund v. Foster, 106 F.Supp.2d 352, 359 (D.Conn. 2000); Stewart v. Sheahan, 1997 WL 392073 at *3-*4 (N.D.Ill. 1997) (". . . Stewart did succeed in putting his petition before the court. If the judge ruled against him because Stewart did not have the resources to disabuse him of his misunderstanding of the law, this is a matter of effective argument. . . . Institutions are not required to provide inmates with the ability to argue the legal basis of their claims in court."). Some courts had reached this conclusion or something similar before *Lewis v. Casey*. *See* Knop v. Johnson, 977 F.2d 996, 1000, 1007 (6th Cir. 1992) (holding the right limited to the "pleading stage," which apparently includes "not only the drafting of complaints and petitions for relief but also the drafting of responses to motions to dismiss and the drafting of objections to magistrates' reports and recommendations"), *cert. denied sub nom.* Knop v. McGinnis, 507 U.S. 973 (1993); Cornett v. Donovan, 51 F.3d 894, 899 (9th Cir. 1995) (holding the right limited to "pleading stage" including reply to a counterclaim or answer to a cross-claim if one is asserted), *cert. denied sub nom.* Henry v. Caballero, 518 U.S. 1033 (1996); Nordgren v. Milliken, 762 F.2d 851, 855 (10th Cir.) (right limited to filing of complaint or petition), *cert. denied*, 474 U.S. 1032 (1985).

In my view *Lewis v. Casey* doesn't mean that; rather, it means that the government is not obligated to make prisoners, many of whom are poorly educated and legally unsophisticated, into "effective[]" litigators, since that's impossible in many cases.[585] In addition, *Lewis* says: "It is the role of courts to *provide relief* to claimants, in individual or class actions, who have suffered, or will imminently suffer, actual harm. . . ."[586] A court does not "provide relief" based only on a complaint; "presenting" a claim requires both defending the claim (*e.g.*, through responding to motions to dismiss and for summary judgment) and moving it toward judgment (*e.g.*, through discovery, motion practice, and ultimately trial).[587] So it makes sense that the obligation to assist prisoners with their legal claims extends to all stages of the litigation. *Bounds v. Smith* itself supports this view.[588]

f. The reasonable relationship standard

The operation of prison law library or legal assistance programs is governed by the "reasonable relationship" standard, which lets prison officials adopt whatever practices or restrictions they choose as long as they are reasonably related to legitimate penological interests.[589] That means that even if restrictions do cause actual harm to prisoners' litigation, they

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[585] The case says: "To demand the conferral of such sophisticated legal capabilities upon a mostly uneducated and indeed largely illiterate prison population is effectively to demand permanent provision of counsel, which we do not believe the Constitution requires." *Lewis*, 343 U.S. at 354.

[586] *Id.*, 343 U.S. at 349 (emphasis supplied).

[587] *See* Bonner v. City of Pritchard, Ala., 661 F.2d 1206, 1212-13 (11th Cir. 1981) (en banc) (holding that the right of court access was not satisfied by permitting prisoner to file a complaint and then dismissing his case until the end of his ten-year sentence); NAACP v. Meese, 615 F.Supp. 200, 206 n. 18 (D.D.C. 1985) (holding the right of court access extends past pleading stage); Gilmore v. Lynch, 319 F.Supp. 105, 111 (N.D.Cal. 1970) holding the (right entails "all the means a defendant or petitioner might require to get a fair hearing from the judiciary"), *aff'd sub nom. Younger v. Gilmore*, 404 U.S. 15 (1971) (per curiam).

[588] As one court pointed out: "The inmates' ability to file is not dispositive of the access question, because the Court in *Bounds* explained that for access to be meaningful, post-filing needs, such as the research tools necessary to effectively rebut authorities cited by an adversary in responsive pleadings, should be met." Morrow v. Harwell, 768 F.2d 619, 623 (5th Cir. 1985), *citing* Bounds v. Smith, 430 U.S. 817, 825-26 (1977); *see* Michael B. Mushlin, 2 *Rights of Prisoners* at § 11:4 (Thomson West, 3d ed. 2002).

[589] Lewis v. Casey, 518 U.S. 343, 361-62 (1996), *citing* Turner v. Safley, 482 U.S. 78 (1987); *see* § II.A, above.

don't violate the right of court access if they are reasonably related to legitimate ends.[590]

g. Prisoners with pending criminal cases

Some courts have held that a prisoner who is represented by criminal defense counsel has no right to a law library or any other means of court access.[591] In my view that conclusion is wrong, because an attorney handling a criminal case is not always prepared to deal with all of the client's other legal problems and proceedings.[592] Of course having a criminal defense lawyer does satisfy the right of court access for purposes of the criminal case itself.[593]

The right to court access with respect to the criminal case is satisfied when a criminal defendant is offered appointed counsel, whether he takes it or not.[594] However, there is also a

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[590] *Lewis, id.*

[591] Johnson by Johnson v. Brelje, 701 F.2d 1201, 1208 (7th Cir. 1983); Canell v. Multnomah County, 141 F.Supp.2d 1046, 1056 (D.Or. 2001); Maillett v. Phinney, 755 F.Supp. at 465-66; Bell v. Hopper, 511 F.Supp. 452, 453 (S.D.Ga. 1981).

[592] Peterkin v. Jeffes, 855 F.2d 1021, 1042-47 (3d Cir. 1988) (noting that availability of counsel to death row inmates did not necessarily extend to federal habeas or civil rights matters); Green v. Ferrell, 801 F.2d 765, 772 (5th Cir. 1986) (noting that availability of defense trial counsel was irrelevant to need for court access for postconviction relief); Mann v. Smith, 796 F.2d 79, 83-84 (5th Cir.1986) (holding that access to a court-appointed defense lawyer who refused to pursue a civil rights claim did not satisfy the court access requirement); Gilland v. Owens, 718 F.Supp. 665, 688-89 (W.D.Tenn. 1989) (holding that availability of criminal defense lawyers did not address the right of access with respect to non-criminal matters). Cf. Martucci v. Johnson, 944 F.2d 291, 295 (6th Cir. 1991) (holding that availability of appointed counsel plus provision of legal materials "on request" satisfied court access requirement in the absence of evidence that the plaintiff was barred from discussing his other problems with the criminal attorney).

[593] Perez v. Metropolitan Correctional Center Warden, 5 F.Supp.2d 208, 211-12 (S.D.N.Y. 1998); Ingalls v. Florio, 968 F.Supp. 193, 202-03 (D.N.J. 1997) (holding that denial of law library access does not establish actual injury in the form of inability to assist one's criminal defense lawyer, since defendants assist their attorneys with factual issues and not legal issues).

[594] United States v. Wilson, 690 F.2d 1267, 1271-72 (9th Cir. 1982), *cert. denied*, 464 U.S. 867 (1983); *see also* Sahagian v. Dickey, 827 F.2d 90, 90-98 (7th Cir. 1987) (prison officials had no obligation to provide law library or legal materials for discretionary direct review of a criminal conviction, since the prisoner already had the benefit of a transcript, initial appellate brief, and appellate opinion).

separate Sixth Amendment right to defend oneself *pro se*.[595] One federal appeals court has stated: "An incarcerated criminal defendant who chooses to represent himself has a constitutional right to access to 'law books . . . or other tools' to assist him in preparing a defense."[596] Others disagree.[597]

2. The right to be free from interference with court access

Government is prohibited from interfering with people's (including prisoners') efforts to use the courts.[598] The Supreme Court has said: "Regulations and practices that unjustifiably obstruct the availability of professional representation or other aspects of the right of access to the courts are invalid."[599] Isolated acts of interference that do not represent regulations or

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[595] Faretta v. California, 422 U.S. 806 (1975) (establishing the right to proceed *pro se*). *But see* Martinez v. Court of Appeal of California, Fourth Appellate District, 528 U.S. 152 (2000) (holding there is no right to self-representation on direct appeal).

[596] Bribiesca v. Galaza, 215 F.3d 1015, 1020 (9th Cir. 2000) (dictum); *accord*, Taylor v. List, 880 F.2d 1040, 1046 (9th Cir. 1989) ("An incarcerated defendant may not meaningfully exercise his right to represent himself without access to law books, witnesses, or other tools to prepare a defense"); Milton v. Morris, 767 F.2d 1443, 1447 (9th Cir. 1985) (holding that the right to a *pro se* criminal defense requires officials to provide "some access to materials and witnesses"); Kaiser v. City of Sacramento, 780 F.Supp. 1309, 1314-15 (E.D.Cal. 1992) (provision of information packets plus cell delivery systems satisfied the Sixth Amendment).

[597] *See* United States v. Taylor, 183 F.3d 1199, 1205 (10th Cir.) (stating that "we announce our agreement with those circuits holding that a prisoner who voluntarily, knowingly and intelligently waives his right to counsel in a criminal proceeding is not entitled to access to a law library or other legal materials"; citing cases), *cert. denied*, 528 U.S. 904 (1999); Degrate v. Godwin, 84 F.3d 768, 769 (5th Cir. 1996) (per curiam); Davis v. Milwaukee County, 225 F.Supp.2d 967, 973 (E.D.Wis. 2002) (holding that exercising the right to a *pro se* defense does not give rise to alternative rights such as access to a law library).

[598] As one court put it:

> First, . . . in order to assure that incarcerated persons have meaningful access to courts, states are required to provide affirmative assistance in the preparation of legal papers in cases involving constitutional rights and other civil rights actions related to their incarceration. . . .
>
> Second, in all other types of civil actions, states may not erect barriers that impede the right of access of incarcerated persons.

John L. v. Adams, 969 F.2d 228, 235 (6th Cir. 1992).

[599] Procunier v. Martinez, 416 U.S. 396, 419 (1974) (striking down a rule barring attorneys from using students and paraprofessionals to conduct prisoner interviews).

practices can also violate the right of court access. Types of interference that have been found unlawful include refusal to let prisoners send their legal papers to court,[600] refusal to allow prisoners to obtain help from other prisoners if there is no other way of getting legal assistance,[601] confiscation or destruction of prisoners' legal papers and books,[602] or destruction or fabrication of evidence or cover-ups of misconduct that deprive its victims of the means to challenge it in court.[603]

Rules, practices, or actions that interfere with court access are not always unlawful; they will be upheld if they satisfy the *Turner v. Safley* standard of a "reasonable relationship" to

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[600] Ex parte Hull, 312 U.S. 546, 549 (1941) (striking down regulation permitting officials to screen prisoners' submissions to court).

[601] Johnson v. Avery, 393 U.S. 483, 490 (1969). *But see* Bass v. Singletary, 143 F.3d 1442,1444-46 (11th Cir. 1998) (holding a claim of interference with mutual assistance requires a showing of actual injury to a non-frivolous criminal appeal, habeas petition, or civil rights action).

[602] Brownlee v. Conine, 957 F.2d 353, 354 (7th Cir. 1992); Roman v. Jeffes, 904 F.2d 192, 198 (3d Cir. 1990); Morello v. James, 810 F.2d 344, 347 (2d Cir. 1987). *But see* Chavers v. Abrahamson, 803 F.Supp. 1512, 1514 (E.D.Wis. 1992) (deprivation of legal materials denies court access only if they are "crucial or essential to a pending or contemplated appeal"); Weaver v. Toombs, 756 F.Supp. 335, 340 (W.D.Mich. 1989) (legal papers sent between inmates could be confiscated because the inmates had not followed the rules for inmate-inmate legal assistance), *aff'd*, 915 F.2d 1574 (6th Cir. 1990).

Generally, prisoners complaining that property has been seized must pursue their claims in state court, *see* nn.534-35, above, but materials essential to court access are not just property; their confiscation states a federal law claim that may be litigated in federal court. Zilich v. Lucht, 981 F.2d 694, 696 (3d Cir. 1992); Morello v. James, 810 F.2d 344, 347-48 (2d Cir. 1987). Merely negligent deprivations of legal papers do not deny access to courts. Crawford-El v. Britton, 951 F.2d 1314, 1318-19 (D.C.Cir. 1991), *cert. denied*, 506 U.S. 818 (1992); Morello v. James, 797 F.Supp. 223, 227 (W.D.N.Y. 1992); Duff v. Coughlin, 794 F.Supp. 521, 524 (S.D.N.Y. 1992).

[603] Christopher v. Harbury, 536 U.S. 403, 414, 416 n. 13 (2002); Chappell v. Rich, 340 F.3d 1279, 1283 (11th Cir. 2003) (per curiam) (". . . [I]nterference with the right of court access by state agents who intentionally conceal the true facts about a crime may be actionable as a deprivation of constitutional rights."), *cert. denied*, 540 U.S. 1219 (2004); Swekel v. City of River Rouge, 119 F.3d 1259, 1262 (6th Cir. 1997); Heinrich ex rel. Heinrich v. Sweet, 62 F.Supp.2d 282, 315 (D.Mass. 1999) and cases cited (stating that the right of court access is violated when government officials wrongfully and intentionally conceal information crucial to judicial redress, do so in order to frustrate the right, and substantially reduce the likelihood of obtaining redress). *But see* Pizzuto v. County of Nassau, 240 F.Supp.2d 203 (E.D.N.Y. 2002) (holding that an attempted cover-up that didn't work did not deny court access).

legitimate penological goals.[604] Courts have upheld a variety of rules and actions that make litigation more difficult for prisoners,[605] including limits on the amount of legal materials a prisoner may possess.[606]

Interference cases are subject to the *Lewis v. Casey* rule that plaintiffs must show "actual injury," *i.e.*, that the interference "frustrated . . . or impeded" a non-frivolous claim.[607] *Christopher v. Harbury*, a non-prisoner interference case, says so,[608] and so have lower courts in prison cases.[609]

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[604] Lewis v. Casey, 518 U.S. 343, 361-62 (1976), *citing* Turner v. Safley, 482 U.S. 87 (1987) (upholding restrictions on "lockdown" prisoners' access to legal materials and assistance); *see* § II.A, above.

[605] *See, e.g.*, Smith v. Erickson, 961 F.2d 1387, 1388 (8th Cir. 1992) (holding refusal to send plaintiff's legal mail was justified by his failure to comply with valid correspondence rules).

[606] *See, e.g.*, Green v. Johnson, 977 F.2d 1383, 1390 (10th Cir. 1992) (upholding rule limiting possession of legal materials in cells to two cubic feet); Savko v. Rollins, 749 F.Supp. 1403, 1407-09(D.Md. 1990) (regulation limiting possession of written material, including legal papers, to 1.5 cubic feet upheld), *aff'd sub nom.* Simmons v. Rollins, 924 F.2d 1053 (4th Cir. 1991).

[607] *See Lewis*, 518 U.S. at 351-53; *see* § IV.A.1.b, above.

[608] 536 U.S. at 415.

[609] *See* Ali v. District of Columbia, 278 F.3d 1, 8 (D.C.Cir. 2003) (applying actual injury rule to a claim that plaintiff had to send legal documents out of the prison); Cody v. Weber, 256 F.3d 764, 769-70 (8th Cir. 2001) (holding deprivation of access to legal documents did not meet the actual injury standard without explanation of what the documents were and how they affected litigation); McBride v. Deer, 240 F.3d 1287, 1290 (10th Cir. 2001) (holding allegation that prison official's refusal to disburse a prisoner's money so he could buy legal materials did not state a court access claim without an explanation of what materials he needed, how the prison law library failed to provide what he needed, or how his legal claim was non-frivolous); Bass v. Singletary, 143 F.3d 1442, 1444-45 (11th Cir. 1998) (rejecting the idea that the actual injury requirement is limited to cases asserting a right to affirmative assistance); Livingston v. Goord, 225 F.Supp.2d 321, 331 (W.D.N.Y. 2003) (dismissing claim of deprivation of legal papers in the absence of any showing of harm; the plaintiff won the relevant case); Leach v. Dufrain, 103 F.Supp.2d 542, 548 (N.D.N.Y. 2000) (holding confiscation of legal papers does not state a court access claim without sufficient information about the quantity and contents of the papers to determine whether the confiscation "impermissibly compromised" a legal action). *Compare* Lueck v. Wathen, 262 F.Supp.2d 690, 695 (N.D.Tex. 2003) (holding that confiscation of the affidavit of a key witness that his defense lawyer never interviewed, which was necessary in his post-conviction proceeding to show that the witness had evidence material to his claim of ineffectiveness of counsel, constituted actual injury).

Lewis v. Casey also said that the *Bounds* right to law libraries or legal assistance is limited to cases about your criminal convictions and sentences and about conditions of confinement. In my view that rule should not apply to interference cases. *Lewis*'s discussion of that restriction focused on the *Bounds v. Smith* assistance requirement and not the rule against interference with court access.[610] Even before *Lewis*, one federal appeals court acknowledged that the *Bounds* right was limited to challenges to convictions, sentences, and prison conditions, but cautioned that "in all other types of civil actions, states may not erect barriers that impede the right of access of incarcerated persons."[611]

As explained above, some courts have said that the *Bounds* right to law libraries or legal assistance stops when you get your complaint filed. If that is correct, does it also apply to interference cases? Again, I think not, and at least one court has agreed. It held that even if *Lewis* does limit the state's *Bounds* obligation to assisting with the filing of complaints, it "cannot, however, be read to give officials license to thwart that litigation once it is filed."[612]

3. The right to be free from retaliation for using the court system

Prison officials may not retaliate against prisoners for using the courts or trying to do so, whatever the form of the retaliation.[613] The Supreme Court has explained: "The reason why such retaliation offends the Constitution is that it threatens to inhibit exercise of the protected right. . . . Retaliation is thus akin to an 'unconstitutional condition' demanded for the receipt of a government-provided benefit."[614] Such actions may be remedied by an injunction, even if the practices are not formally part of official policy,[615] or by an award of damages.[616]

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[610] *Lewis* said: "The tools [*Bounds v. Smith*] requires to be provided are those that inmates need in order to attack their sentences, directly or collaterally, and in order to challenge the conditions of their confinement." 518 U.S. at 355.

[611] John L. v. Adams, 969 F.2d 228, 235 (6th Cir. 1992).

[612] Rhoden v. Godinez, 1996 WL 559954 *3 (N.D.Ill. 1996).

[613] *See, e.g.*, DeTomaso v. McGinnis, 970 F.2d 211, 214 (7th Cir. 1992) ("whether the retaliation takes the form of property or privileges does not matter") (dictum); Williams v. Meese, 926 F.2d 994, 998 (10th Cir. 1991) (job denials and transfers); Madewell v. Roberts, 909 F.2d 1203, 1206 (8th Cir. 1990) (blocking reclassification opportunities, worsening living and working conditions).

[614] Crawford-El v. Britton, 523 U.S. 574, 588 n.10 (1998).

[615] Gomez v. Vernon, 255 F.3d 1118, 1127, 1129-30 (9th Cir.), *cert. denied sub nom.* Beauclair v. Puente Gomez, 534 U.S. 1066 (2001); Ruiz v. Estelle, 679 F.2d 1115, 1154 (5th Cir. 1982), *cert. denied*, 460 U.S. 1042 (1983); Pratt v. Rowland, 770 F.Supp. 1399, 1406 (N.D.Cal.

> A retaliation claim essentially entails three elements: (1) the plaintiff engaged in protected conduct; (2) an adverse action was taken against the plaintiff that would deter a person of ordinary firmness from continuing to engage in that conduct; and (3) there is a causal connection between elements one and two–that is, the adverse action was motivated at least in part by the plaintiff's protected conduct.[617]

Even if the plaintiff establishes the elements of the claim, defendants can still prevail if they show that they would have taken the same action without the retaliatory motive (the "but for" test).[618]

The "adverse action" need not be unconstitutional by itself to violate the rule against retaliation.[619] For example, disciplinary charges for which the punishment was not sufficiently "atypical and significant" to require due process protections[620] may still be unconstitutional if

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1991).

[616] Dannenberg v. Valadez, 338 F.3d 1070 (9th Cir. 2003) (noting jury verdict of $6,500 compensatory and $2,500 punitive damages for retaliation for assisting another prisoner with litigation; noting injunction requiring expungement of material related to disciplinary action); Coleman v. Turner, 838 F.2d 1004, 1005 (8th Cir. 1988) (nominal damages only); Lamar v. Steele, 693 F.2d 559, 562 (5th Cir. 1982) (nominal damages), *on rehearing*, 698 F.2d 1286 (5th Cir. 1983), *cert. denied*, 464 U.S. 821 (1983); Cruz v. Beto, 603 F.2d at 1181.

[617] Thaddeus-X v. Blatter, 175 F.3d 378, 394 (6th Cir. 1999) (en banc); *accord*, Scott v. Coughlin, 344 F.3d 282, 287-88 (2d Cir. 2003); Bennett v. Goord, 343 F.3d 133,137 (2d Cir. 2003) (holding the prisoner must show "first, that he engaged in constitutionally protected conduct and, second, that the conduct was a substantial or motivating factor for the adverse actions taken by prison officials"); *see* Farrow v. West, 320 F.3d 1235, 1248-49 (11th Cir. 2003) (affirming summary judgment for defendants where prisoner failed to show that defendants knew of his protected activity and therefore failed to establish causation).

[618] Bennett v. Goord, *id.*; Carter v. McGrady, 292 F.3d 152, 154 (3d Cir. 2002); Ponchik v. Bogan, 929 F.2d 419, 420 (8th Cir. 1991); Smith v. Maschner, 899 F.2d 940, 949-50 (10th Cir. 1990). *Contra*, Adams v. Wainwright, 875 F.2d 1536, 1537 (11th Cir. 1989) (per curiam) (declining to adopt the "but for" test because it increases the burden on the prisoner).

[619] Cody v. Walker, 256 F.3d 764, 771 (8th Cir. 2001); Wilson v. Silcox, 151 F.Supp.2d 1345, 1351 (N.D.Fla. 2001), *citing* Thomas v. Evans, 880 F.Supp.2d 1235, 1242 (11th Cir. 1989).

[620] *See* § III.A, above.

they were made for retaliatory reasons.[621] In recent years many courts have held that retaliatory action must be serious enough to deter "a similarly situated individual of ordinary firmness" from exercising First Amendment rights.[622]

Courts have held a variety of actions sufficiently "adverse" to support a suit for retaliation.[623]

Retaliation is easy to allege and courts are inclined to be suspicious of such claims.[624] However, the plaintiff's burden may also be met by sufficiently convincing circumstantial evidence such as the time sequence of the legal action and the alleged retaliation.[625]

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[621] Allah v. Sieverling, 229 F.3d 220, 224 (3d Cir. 2000); Williams v. Manternach, 192 F.Supp.2d 980, 987 (N.D.Iowa 2002).

[622] Davis v. Goord, 320 F.3d 346, 353 (2d Cir. 2003); *accord*, Allah v. Sieverling, 229 F.3d at 224; Thaddeus-X v. Blatter, 175 F.3d 378, 397-98 (6th Cir. 1999) (en banc) (noting the standard is intended to weed out "inconsequential" actions and may require prisoners to tolerate more than public employees or "average citizens");

The question whether a particular action would deter a person of ordinary firmness is an objective one and does not depend on how a particular plaintiff reacts; the question is whether the defendants' actions are *capable* of deterring a person of ordinary firmness. Bell v. Johnson, 308 F.3d 594, 606 (6th Cir. 2002). In a case tried to a jury, that question is to be decided by the jury, *id.*, 308 F.3d at 603, and the claim need not be supported by expert testimony. *Id.* at 605-07.

[623] Davis v. Goord, 320 F.3d 346, 353 (2d Cir. 2003) (holding denial of high fiber diet, having to wait for a medical appointment, and having to deal with defendants' obstruction of grievances might meet the standard, but "[i]nsulting or disrespectful comments" ordinarily do not); Bell v. Johnson, 308 F.3d 594, 604-05 (6th Cir. 2002) (confiscating legal papers, destroying property, confiscating dietary supplements prescribed for AIDS); Walker v. Thompson, 298 F.3d 1005, 1008-09 (7th Cir. 2002) (denial of out-of-cell exercise); Morales v. Mackalm, 278 F.3d 126, 132 (2d Cir. 2002) (transfer to a psychiatric hospital was sufficiently adverse, calling plaintiff a "stoolie" was not); Gomez v. Vernon, 255 F.3d 1118, 1127, 1130 (9th Cir.) (threats of transfer), *cert. denied sub nom.* Beauclair v. Puente Gomez, 534 U.S. 1066 (2001); Wilson v. Silcox, 151 F.Supp.2d 1345, 1350 (N.D. Fla. 2001) (verbal harassment and threats of bodily harm).

[624] *See, e.g.*, Davis v. Goord, 320 F.3d 346, 352 (2d Cir. 2003); Dawes v. Walker, 239 F.3d 489, 491 (2d Cir. 2001).

[625] Bennett v. Goord, 343 F.3d at 138-39 (finding time sequence of litigation and alleged retaliation sufficient to spport claim, plus the fact that the retaliatory discipline was later found unjustified by higher authorities); Flaherty v. Coughlin, 713 F.2d 10 (2d Cir. 1983); Baskerville v. Blot, 224 F.Supp.2d 723, 733 (holding that the fact the alleged retaliatory disciplinary charges were dismissed, and evidence that the officers made statements suggesting retaliatory motive, supported

Retaliation claims, logically, should not be subject to the *Lewis v. Casey* requirements that the plaintiff show "actual injury" in the form of impairment of litigation of a non-frivolous claim. "In a retaliation claim . . ., the harm suffered is the adverse consequences which flow from the inmate's constitutionally protected action. Instead of being *denied* access to the courts, the prisoner is penalized for actually exercising that right."[626] Nor in my view should retaliation claims be limited to retaliation for suits challenging criminal convictions or conditions of confinement, since that *Lewis v. Casey* rule was intended to apply only to prison officials' affirmative obligation to assist prisoners with law libraries or legal assistance.[627] However, court decisions to date are to the contrary.[628]

B. Alternatives to the right of court access

As shown in the previous section, recent Supreme Court decisions have made it very difficult for prisoners to pursue court access claims. However, some claims that are commonly framed as court access claims may be more successfully pursued under other legal theories. For example, interference with attorney-client consultation or invasion of its confidentiality is a violation of the First Amendment, outside prison[629] or inside.[630] As such, it is not subject to the

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a claim of retaliation); Baker v. Zlochowon, 741 F.Supp. 436, 439-40 (S.D.N.Y. 1990); Jones v. Coughlin, 696 F.Supp. at 922.

[626] Thaddeus-X v. Blatter, 175 F.3d at 394; *accord*, Poole v. County of Otero, 271 F.3d 955, 960 (10th Cir. 2001). *But see* Oliver v. Powell, 250 F.Supp.2d 593, 600 (E.D.Va. 2002) (holding that a prisoner who continued to file suits after retaliatory acts had no claim for unconstitutional retaliation).

[627] *See* § IV.A.1.c, above.

[628] *See* Johnson v. Rodriguez, 110 F.3d 299, 311 (5th Cir.) (applying *Lewis* rule to hold that retaliation for bringing lawsuits other than those challenging convictions and conditions of confinement does not violate the Constitution), *cert. denied*, 522 U.S. 995 (1997); *see also* Herron v. Harrison, 203 F.3d 410, 415 (6th Cir. 2000) (holding retaliation for a frivolous complaint is not actionable).

[629] *See* Poole v. County of Otero, 271 F.3d 955, 961 (10th Cir. 2001) ("First Amendment rights of association and free speech extend to the right to retain and consult with an attorney."); Denius v. Dunlap, 209 F.3d 944 (7th Cir. 2000). *Denius* states:

> The right to hire and consult an attorney is protected by the First Amendment's guarantee of freedom of speech, association and petition. Furthermore, the right to obtain legal advice does not depend on the purpose for which the advice was sought. . . . In sum, the First Amendment protects the right of an individual or group to consult with an attorney on any legal matter.
>
> . . . Because the maintenance of confidentiality in attorney-client

requirement of many court access claims, discussed above, that the challenged action have caused actual injury by impeding the litigation of a non-frivolous legal claim concerning prison conditions or a criminal conviction or sentence. The same is true of a claim that interference with attorney-client consultation or other obstruction of the preparation and presentation of a criminal defense violated the Sixth Amendment right to counsel.[631] Intrusion on attorney-client confidentiality by eavesdropping, wiretapping, reading legal mail, etc., would seem to be a search within the meaning of the Fourth Amendment.[632] Failure to provide adequate facilities for confidential legal communications has been held to violate the Fourteenth Amendment right to privacy by at least one court.[633] Finally, the Supreme Court has characterized litigation as speech (or, more precisely, has so characterized arguments made in the course of litigation);[634] whether that holding has any implications for prisoners' legal activities has not been explored.

V. Equal Protection

The Fourteenth Amendment guarantees everyone the equal protection of the laws, but the rational basis test applies to most prisoner equal protection claims even when fundamental rights

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communications is vital to the ability of an attorney to effectively counsel her client, interference with this confidentiality impedes the client's First Amendment, [sic] right to obtain legal advice.

[630] Massey v. Helman, 221 F.3d 1030, 1035-36 (7th Cir. 2000) (acknowledging attorney's First Amendment claim but rejecting it on the merits); Sturm v. Clark, 835 F.2d 1009, 1015 and n.3 (3d Cir. 1987) (holding special restrictions on one attorney's prisoner consultation stated a violation of her First Amendment rights; *but* seeming to assume that violations of confidentiality only implicated the client's First Amendment rights); Williams v. Price, 25 F.Supp.2d 623, 629-30 (W.D.Pa. 1998) (holding that lack of confidentiality in attorney-client consultation violated the First Amendment); Chinchello v. Fenton, 763 F.Supp. 793 (M.D.Pa. 1991) (holding that interception and reading of a prisoner's letter to an attorney violated the First Amendment).

[631] Benjamin v. Fraser, 264 F.3d 175, 186 (2d Cir. 2001) ("It is not clear to us what 'actual injury' would even mean as applied to a pretrial detainee's right to counsel.")

[632] In *Mockaitis v. Harcleroad*, 104 F.3d 1522, 1532-34 (9th Cir. 1997), the court affirmed liability under the Fourth Amendment for the taping of a detainee's confession to priest, relying on the statutory and historical clergy-penitent privilege as the basis for a reasonable expectation of privacy. The attorney-client privilege is equally deeply rooted. *See* Swidler & Berlin v. U.S., 524 U.S. 399 (1998).

[633] Williams v. Price, 25 F.Supp.2d 623, 619 (W.D.Pa. 1998).

[634] Legal Services Corp. v. Velazquez, 531 U.S. 533, 541-42 (2001).

are at stake.[635] The standard for prison racial discrimination claims is unsettled and is before the Supreme Court.[636] Intermediate scrutiny has been applied in some gender discrimination cases.[637] A number of courts have held that prison equal protection claims must be assessed under the *Turner* reasonable relationship standard.[638]

Equal protection analysis requires that groups being compared be "similarly situated," which dooms most claims that prisoners are treated differently from non-prisoners.[639] The new game in town is to declare that groups of prisoners are not "similarly situated" and therefore no standard of scrutiny must be met. This method has been applied to some recent prison gender discrimination suits.[640]

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[635] *See, e.g.*, Jones v. North Carolina Prisoners' Labor Union, 433 U.S. 119, 136 (1977) (rejecting equal protection claim involving First Amendment rights of association); Boling v. Romer, 101 F.3d 1336 (10th Cir. 1996) (upholding requirement that prisoners convicted of sexual assault provide DNA samples); Lee v. Governor of State of New York, 87 F.3d 55, 60 (2d Cir. 1996) (upholding exclusion of certain categories of prisoners from temporary release).

[636] *See* Johnson v. California, 321 F.3d 791 (9th Cir. 2003), *cert. granted*, 124 S.Ct. 1505 (2004).

[637] *See, e.g.*, Glover v. Johnson, 478 F.Supp. 1075, 1079 (E.D.Mich. 1979) (requiring "parity of treatment").

[638] Johnson v. California, 321 F.3d at 799-803; Yates v. Stalder, 217 F.3d 332, 335 (5th Cir. 2000); Benjamin v. Coughlin, 905 F.2d 571 (2d Cir. 1990).

[639] *See, e.g.*, Allen v. Cuomo, 100 F.3d 253, 260 (2d Cir. 1996) (a surcharge on disciplinary convictions lacking a hardship waiver for indigents, unlike other state statutes, does not deny equal protection. "Inmates are not similarly situated to unincarcerated persons subject to other surcharges.... The rights of prisoners are necessarily limited because of their incarceration, not to mention that all their essential needs, such as food, shelter, clothing and medical care, are provided by the state.")

[640] *See* Klinger v. Department of Corrections, 31 F.3d 727 (8th Cir. 1994) (women prisoners are not similarly situated to male prisoners for purposes of a challenge to unequal program opportunities because the women's prison is smaller than the men's prisons, the length of stay for men is longer, the women's prison has a lower security classification than some of the men's prisons, and women prisoners have "special characteristics distinguishing them from male inmates, ranging from the fact that they are more likely to be single parents with primary responsibility for child rearing to the fact that they are more likely to be sexual or physical abuse victims."), *cert. denied*, 513 U.S. 1185 (1995); *accord*, Women Prisoners of the District of Columbia Dept. of Corrections v. District of Columbia, 93 F.3d 910, 925-27 (D.C.Cir. 1996); Keevan v. Smith, 100 F.3d 644 (8th Cir. 1996).

VI. Pre-trial Detainees

The Eighth Amendment has no application to unconvicted persons; their treatment is governed by the Due Process Clause,[641] which protects persons who have not been convicted from being punished through their treatment in jail.[642]

". . . [A] showing of an intent to punish suffices to show unconstitutional pretrial punishment."[643] That's the easy case. Absent expressed punitive intent, the plaintiff must show that the challenged practice is not "reasonably related to a legitimate governmental objective,"[644] or that conditions inflict "genuine privations and hardship over an extended period of time."[645]

Exactly what any of that means is not clear, since the Supreme Court has not heard a detainee conditions case since 1984 and has not elaborated on the application of the *Wolfish* "no punishment" holding. In the interim, it has declared and elaborated a "reasonable relationship" test for the civil liberties claims of convicted prisoners without saying whether it is the same reasonable relationship test it asserted in *Wolfish*. It has also elaborated its Eighth Amendment jurisprudence considerably, without saying whether the "punishment" analysis that led it to

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[641] City of Revere v. Massachusetts General Hosp., 463 U.S. 239, 244 (1983).

[642] Bell v. Wolfish, 441 U.S. 520, 535 (1979); *accord*, Block v. Rutherford, 468 U.S. 576, 585-86 (1984); Magluta v. Samples, 375 F.3d 1269, 1273 (11th Cir. 2004).

[643] McMillian v. Johnson, 88 F.3d 1554, 1564 (11th Cir.) (holding evidence that a detainee in a capital case was placed on death row, contrary to state law and prison regulations, for punitive rather than security reasons supported due process claim, even if there could have been a legitimate alternative purpose), *amended,* 101 F.3d 1363 (11th Cir. 1996); *accord*, Magluta v. Samples, 375 F.3d 1269, 1274-75 (11th Cir. 2004) (holding allegations that jail officials fabricated escape allegations and kept him in segregation in retaliation for constitutionally protected conduct stated a claim of unconstitutional punishment); Gerakaris v. Champagne, 913 F.Supp. 646, 651 (D.Mass. 1996).

In *Villareal v. Woodham*, 113 F.3d 202 (11th Cir. 1997), the plaintiff complained that he was forced to perform translation services for other inmates, medical personnel, and court personnel; he said he was assured he would be paid, but was not. The court held that this conduct did not constitute punishment because there was no punitive intent, the required services were not "restrictions," and they posed no risk to his welfare. 113 F.3d at 207-08. This holding conflates the analysis of punishment under *Wolfish* with the determination of cruel and unusual punishment under more recent Supreme Court decisions.

[644] *Wolfish*, 441 U.S. at 538-39; *accord*, Block v. Rutherford, 468 U.S. at 586.

[645] *Id.* at 542.

require a showing of criminal recklessness or malicious and sadistic intent in Eighth Amendment cases has implications for the very different punishment analysis of *Wolfish*, or whether its holdings concerning the objective seriousness of conditions required by the Eighth Amendment bears on the "genuine privations and hardship" standard of *Wolfish*. It has not addressed whether the standards of *Wolfish*, which were articulated in a case challenging ongoing jail practices, also govern challenges to individual instances of alleged mistreatment. In short, there is a remarkable lack of definition of the difference, if any, in government's obligations to persons incarcerated for conviction of crime and to persons merely accused and not subject to punishment.[646] In that vacuum, many lower courts have abandoned any notion that there is a difference between convicts' and detainees' rights,[647] and others have simply stated (as did the Supreme Court in one case) that detainees' rights are "at least as great" as those of a convicted prisoner,[648] without attempting to say what the difference might be.[649]

The Eleventh Circuit has stated more than once that detainees' claims–at least, those that are analogous to the Eighth Amendment claims of convicts–are governed by the same standards as Eighth Amendment claims,[650] and it has provided a rationale of sorts: "Distinguishing the

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[646] Forget the presumption of innocence. The Court dismissed it in *Wolfish* as merely a rule of evidence having nothing to do with conditions of confinement. *Wolfish, id.* at 533.

[647] *See, e.g.,* Craig v. Eberly, 164 F.3d 490, 495 (10th Cir. 1998) ("Although the Due Process Clause governs a pretrial detainee's claim of unconstitutional conditions of confinement, . . . the Eighth Amendment standard provides the benchmark for such claims."); Cottrell v. Caldwell, 85 F.3d 1480, 1490 (11th Cir. 1996) (Under Eighth Amendment and Due Process Clause, "the applicable standard is the same, so decisional law involving prison inmates applies equally to cases involving arrestees or pretrial detainees."). Some circuits have held that detainees' and convicts' use of force claims are governed by the same standard. *See* U.S. v. Walsh, 194 F.3d 37, 47-48 (2d Cir. 1999); Valencia v. Wiggins, 981 F.2d 1440, 1446 (5th Cir.), *cert. denied*, 509 U.S. 905 (1993).

[648] City of Revere v. Massachusetts General Hosp., 463 U.S. at 244.

[649] The Ninth Circuit has suggested in dictum that in medical care cases, detainees might be entitled to the benefit of the standard it has held applicable to persons civilly committed, which requires committing physicians to "exercise judgment 'on the basis of substantive and procedural criteria that are not substantially below the standards generally accepted in the medical community.'" Lolli v. County of Orange, 351 F.3d 410, 415 (9th Cir. 2003), *quoting* Jensen v. Lane County, 312 F.3d 1145, 1147 (9th Cir.2002).

[650] Cottrell v. Caldwell, 85 F.3d 1480, 1490 (11th Cir. 1996); Hamm v. DeKalb County, 774 F.2d 1567, 1574 (11th Cir. 1985). In *Wilson v. Blankenship*, 163 F.3d 1284, 1291-95 (11th Cir. 1998), the court upheld the denial of outdoor and meaningful indoor exercise to a detainee held for two and a half months in a city jail, emphasizing the lack of punitive purpose and the relative brevity of the plaintiff's confinement.

eighth amendment and due process standards in this area would require courts to evaluate the details of slight differences in conditions. . . .That approach would result in the courts' becoming 'enmeshed in the minutiae of prison operations,' . . . . Life and health are just as precious to convicted persons as to pretrial detainees."[651] However, the court has not been entirely consistent about applying this holding,[652] and it is not clear how it would approach issues not analogous to Eighth Amendment claims.

A few courts have made attempts to fill parts of this analytical gap. The Fifth Circuit has distinguished between challenges to "general conditions, practices, rules, or restrictions of pretrial confinement" and jail officials' "episodic acts or omissions," and has held that *Wolfish* "retains vitality" only as the former.[653] Since both the *Wolfish* analysis and the Supreme Court's subsequent Eighth Amendment analysis turn on the presence or absence of "punishment," and since there is no constitutionally significant difference between detainees' and convicts' entitlement to basic human needs, the Eighth Amendment subjective deliberate indifference standard is the measure of culpability for all "episodic acts or omissions" regardless of the prisoner's legal status; indeed, the court says, "a proper application of *Bell*'s reasonable relationship test is functionally equivalent to a deliberate indifference inquiry."[654] To invoke the *Wolfish* analysis, a detainee must show that a challenged act or omission "implement[s] a rule or restriction or otherwise demonstrate[s] the existence of an identifiable intended condition or practice," or else show that acts or omissions "were sufficiently extended or pervasive, or otherwise typical of extended or pervasive misconduct by other officials, to prove an intended condition or practice to which the *Bell* test can be meaningfully applied."[655]

The Second Circuit, by contrast, addressed a jail environmental conditions case by noting that the inquiry into punitiveness–essentially an intent requirement–is "of limited utility" in evaluating conditions which mostly "were not affirmatively imposed."[656] The court declined to hold the plaintiffs to the actual knowledge standard of *Farmer v. Brennan*, stating:

. . . [T]his requirement is unique to Eighth Amendment claims, stemming from

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[651] *Hamm, id.*

[652] *See* Lumley v. City of Dade City, Florida, 327 F.3d 1186, 1196 (11th Cir. 2003) (applying due process "shock the conscience" standard to claim of prisoner kept strapped to a hospital bed after arrest; *Wolfish* not cited).

[653] Hare v. City of Corinth, Miss., 74 F.3d 633, 643 (5th Cir. 1996) (en banc).

[654] *Hare*, 74 F.3d at 643.

[655] *Hare*, 74 F.3d at 645.

[656] Benjamin v. Horn, 343 F.3d 35, 49 (2d Cir. 2003).

> that amendment's prohibition of cruel and unusual *punishments* as opposed to cruel and unusual *conditions*. . . . The analysis of a claim brought by one who cannot be punished at all is different, beginning instead from the premise of a state's obligation to take some responsibility for the safety of those involuntarily committed to its custody. . . . [I]n a challenge by pretrial detainees asserting a *protracted* failure to provide safe prison conditions, the deliberate indifference standard does not require the detainees to show anything more than actual or imminent substantial harm.[657]

The court declined to generalize about pre-trial detainees' rights, stating: "In other types of challenges–for example, when pretrial detainees challenge discrete judgments of state officials–meeting the deliberate indifference standard may require a further showing."[658] And indeed, in other contexts, the Second Circuit has, like other courts, held or assumed that Eighth Amendment standards do apply in detainee cases.[659]

These conditions of confinement decisions say little about the similarity or difference in governing standards with respect to practices that restrict prisoners' civil liberties. The Second Circuit has expressed doubt that the *Turner v. Safley* reasonable relationship standard applies to pre-trial detainees, since the "penological interests" with which *Turner* was concerned include "interests that related to the treatment (including punishment, deterrence, rehabilitation, etc.) of persons convicted of crimes."[660]

There are some legal rights which by their nature apply differently to detainees and convicts, or not at all to convicts. Persons awaiting trial have a Sixth Amendment right to the assistance of counsel and to an unimpeded criminal defense that is different from the more

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[657] *Benjamin, id.* at 51.

[658] *Id.* at n. 18.

[659] *See, e.g.,* Cuoco v. Moritsugu, 222 F.3d 99, 106-07 (2d Cir. 2000) (holding that pre-trial detainees' medical care claims invoke the Eighth Amendment deliberate indifference standard); U.S. v. Walsh, 194 F.3d 37, 47-48 (2d Cir. 1999) (applying requirement of malicious and sadistic intent to detainee's use of force claim).

[660] Benjamin v. Fraser, 264 F.3d 175, 187 n.10 (2d Cir. 2001); *see* Shain v. Ellison, 273 F.3d 56, 65-66 (2d Cir. 2001) (holding *Turner* applies to prisons and not jails), *cert. denied sub nom.* Nassau County, New York v. Shain, 537 U.S. 1083 (2002). *But see* Mauro v. Arpaio, 188 F.3d 1054 (9th Cir. 1999) (en banc) (applying *Turner* standard to jail censorship), *cert. denied*, 529 U.S. 1018 (2000). *Compare id.* at 1059 n.2, 1067 (dissenting opinion) (rejecting "penological interests" as applied to unconvicted persons).

general right of access to courts and not subject to its limitations.[661] Persons who have not been convicted of crimes may not be forced to work under the Thirteenth Amendment, though courts sometimes construe this protection narrowly.[662] The *Sandin v. Conner* "atypical and significant hardship" threshold for convicts' due process claims is inapplicable to detainees because it is based on the premise that a criminal *conviction* largely extinguishes liberty.[663] Similarly, the Second Circuit has held that its rule subjecting law-enforcement-related cell searches to the Fourth Amendment applies only to detainees, not to convicts, because "a convicted prisoner's loss of privacy rights can be justified on grounds other than institutional security," i.e., retribution.[664]

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[661] Benjamin v. Fraser, 264 F.3d 175, 184-88 (2d Cir. 2001).

[662] *See* Channer v. Hall, 112 F.3d 214, 218-19 (5th Cir. 1997) (holding immigration detainee compelled to work in prison food service fell within the "civic duty" exception to the Thirteenth Amendment); Ford v. Nassau County Executive, 41 F.Supp.2d 392, 397 (E.D.N.Y. 1999) (holding that compulsory work as "food cart worker" resembled "housekeeping duties" rather than "forced labor"; Thirteenth Amendment is violated by "compulsory labor akin to African slavery").

[663] *See* § III.C, above.

[664] Willis v. Artuz, 301 F.3d 65, 69 (2d Cir. 2002); *compare* U.S. v. Cohen, 796 F.2d 20, 24 (2d Cir.), *cert. denied*, 479 U.S. 854 (1986).

The Prison Litigation Reform Act in the Eleventh Circuit

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The main materials I have provided on the PLRA, which appear after this memo, were written for a Second Circuit audience, although they cite authority nationwide. This memo concisely lists the Eleventh Circuit's significant PLRA decisions as well as some significant district court authority within the circuit, and identifies issues that appear particularly troublesome. These comments should be read in conjunction with the corresponding sections of the main PLRA materials.

II. Scope and Definitions

Habeas corpus proceedings are not civil actions for purposes of the PLRA filing fee provisions.
Anderson v. Singletary, 111 F.3d 801 (11th Cir. 1997).

A Rule 41(g) motion for return of property is a civil action subject to the PLRA filing fee provisions.
U.S. v. Wade, 291 F.Supp.2d 1314, 1317 (M.D.Fla. 2003).

Whether an action was "brought by a prisoner" for PLRA purposes is determined as of the initial filing, regardless of the plaintiffs' status as of any subsequent amended complaint. However, dismissal under the mental/emotional injury provision of a claim that is filed during confinement should be without prejudice to re-filing after release.
Harris v. Garner, 216 F.3d 970, 973-80 (11th Cir. 2000) (en banc).

A "prisoner" for PLRA purposes is only someone who is criminally incarcerated; a person civilly committed under a sexual predator statute is not a prisoner even if he is held in a unit within a prison.
Troville v. Venz, 303 F.3d 1256, 1260 (11th Cir. 2002).
Note: The court's exact language refers to "the PLRA's straightforward definition of 'prisoner' to

apply only to persons incarcerated *as punishment for a criminal conviction.*" *Id.* (emphasis supplied) That is not quite right. The statute refers to "any person incarcerated *or detained* in any facility who is *accused of*, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary program." 42 U.S.C. § 1997(h) (emphasis supplied).

A parolee is not a prisoner and need not exhaust administrative remedies under the PLRA.
Yahweh v. United States Parole Comm'n, 158 F.Supp.2d 1332, 1342 n.30 (S.D.Fla. 2001).

The PLRA does not "in any way affect[]" the consideration of class certification, leaving courts to apply "existing law governing class certification."
Anderson v. Garner, 22 F.Supp.2d 1379, 1383 (N.D.Ga. 1997).

III. Prospective Relief

The Prison Litigation Reform Act's judgment termination provision does not reopen final judgments in violation of the separation of powers and does not deny due process, equal protection, or access to courts.
Dougan v. Singletary, 129 F.3d 1424 (11th Cir. 1997), *cert. denied*, 524 U.S. 956 (1998).

The judgment termination provision doesn't violate the *U.S. v. Klein* rule against legislative "rules of decision" for pending cases. Requiring that injunctions be tailored to federal law violations does not strip the courts of their ability to enforce effective remedies in constitutional cases, and Congress has the authority to require injunctions to be supported by specified findings.
Nichols v. Hopper, 173 F.3d 820 (11th Cir. 1999).

In a PLRA judgment termination proceeding, even if the judgment was supported by the proper findings when it was entered, there must be evidence of a current and ongoing violation of federal law for the judgment to survive. "Current and ongoing" may not necessarily mean "right now" but may also refer to what may happen once the judgment is terminated (dictum). The court accepts *arguendo* the view that current and ongoing means "a substantial and very real danger that a violation of rights will follow the termination of the injunction" but finds that defendants' statements to the press do not meet that standard.
Parrish v. Alabama Dept. of Corrections, 156 F.3d 1128, 1129-30 (11th Cir. 1998).
Note: The dictum about "current and ongoing" and "right now" is arguably rejected in *Cason v. Seckinger*, below.

Contempt orders entered years earlier do not show a current and ongoing federal law violation. Violating an injunction does not mean that a federal right was violated.
Parrish v. Alabama Dept. of Corrections, 156 F.3d 1128, 1130 (11th Cir. 1998).

In a PLRA termination proceeding, it is an abuse of discretion to refuse to conduct an evidentiary

hearing on current conditions, notwithstanding the existence of recent court monitor's reports. "The party opposing termination must be given the opportunity to challenge or supplement the findings of the monitor and to present evidence concerning the scope of the challenged relief and whether there are 'current and ongoing' violations of federal rights in the prison." (1342) Permanent injunctions are subject to the termination provision.

Loyd v. Alabama Dept. of Corrections, 176 F.3d 1336, 1342 (11th Cir. 1999).

The refusal of a hearing on a motion to terminate a judgment was error. "[A] 'current and ongoing' violation is a violation that exists at the time the district court conducts the § 3626(b)(3) inquiry, and not a potential future violation." (784) Preserving relief against a termination motion requires "need-narrowness-intrusiveness" findings that address current conditions, not those at the time the judgment was entered. The statute requires "particularized findings, on a provision-by-provision basis, that each requirement imposed by the consent decrees satisfies the need-narrowness-intrusiveness criteria, given the nature of the current and ongoing violation." However (785 n. 8): "The parties are free to make any concessions or enter into any stipulations they deem appropriate."

Cason v. Seckinger, 231 F.3d 777 (11th Cir. 2000); *see Laube v. Campbell*, 333 F.Supp.2d 1234 (M.D.Ala. 2004) (applying latter holdings to the initial approval of a settlement).

Note: The requirement of "particularized findings, on a provision-by-provision basis," has been called into question by another court. *Benjamin v. Fraser*, 156 F.Supp.2d 333, 342 (S.D.N.Y. 2001), *aff'd in part, vacated and remanded in part on other grounds*, 343 F.3d 35 (2d Cir. 2003). In addition, it appears to conflict with common sense in a situation where the record shows that a violation remains but that the relief needed for it is different from the pre-existing relief, either because the pre-existing relief has failed to work or because the nature and extent of the violation has changed.

Punitive damages are prospective relief under the plain language of 18 U.S.C. § 3626 and its restrictions apply to such awards, which must be no larger than reasonably necessary to deter the kind of violations shown, imposed against no more defendants than necessary to serve the deterrent function, and the least intrusive way of doing so. The court says the court should determine this, does not say why it's not a jury question.

Johnston v. Breeden, 280 F.3d 1308, 1325-26 (11th Cir. 2002).

Before approving a settlement, a court must determine whether it complies with the PLRA. However, private settlement agreements–which do not contemplate judicial enforcement but only reinstatement of the case or state court relief–are not subject to the terms of the PLRA.

Austin v. Hopper, 28 F.Supp.2d 1231, 1235 (M.D.Ala. 1998); *accord, Gaddis v. Campbell*, 301 F.Supp.2d 1310, 1313-14 (M.D.Ala. 2004).

In approving a consent decree, one court relied heavily on the agreement of the parties that the PLRA requirements are met: "The court finds that the two proposed agreements, in particular the remedial provisions to which the parties have agreed, are based on an informed assessment of the facts and the law and represent the parties' considered judgment as to what is necessary, narrow, and least intrusive with respect to the specific problems presented in this case, with which the parties are

intimately familiar. The parties also agree that the two agreements 'will not have an adverse impact on public safety or the operation of the criminal justice system.'" The agreement itself states "The parties agree, and the Court hereby finds at this time, and after an independent review," that the statutory requirements are met.

Laube v. Campbell, 333 F.Supp.2d 1234, 1239, 1252 (M.D.Ala. 2004).

The filing of a judgment termination motion does not automatically stay an entire decree, but only prospective relief within the decree. Agreed payment of attorneys' fees for monitoring purposes continues in effect, since attorneys' fees are not prospective relief, and plaintiffs will require the fees to finance the necessary factual inquiry. Monitoring is not prospective relief.

Carruthers v. Jenne, 209 F.Supp.2d 1294, 1297-1300 (2002).

A "healthcare monitor" is not subject to the PLRA special master provisions because it is not a quasi-judicial position like a Rule 53 special master.

Laube v. Campbell, 333 F.Supp.2d 1234, 1239-40 (M.D.Ala. 2004) (adopting analysis of *Benjamin v. Fraser*, 343 F.3d 35, 44-46 (2d Cir.2003).)

The court states the required PLRA findings minimally in imposing new relief in a case settled by consent judgment: "The Court finds that this relief is narrowly drawn, extends no further than necessary to correct violations of federal rights arising from defendants' failure to comply with the Final Settlement Agreement, and is the least intrusive means to correct these violations."

Foster v. Fulton County, Georgia, 223 F.Supp.2d 1292, 1294 (N.D.Ga. 2002).

A remedial plan limiting the transfer of plaintiffs into a prison was a prisoner release order, and a single judge couldn't enter it; defendants who submitted the plan are directed to submit a new plan that will work without a prisoner release order.

Laube v. Haley, 242 F.Supp.2d 1150, 1152 (M.D.Ala. 2003).

A preliminary injunction expired after the passage of 90 days and the court had no further power to act until and unless plaintiffs moved for another preliminary injunction.

Laube v. Campbell, 255 F.Supp.2d 1301, 1303-04 (M.D.Ala. 2003).

IV. Exhaustion of Administrative Remedies

Allegations that administrative remedies are futile or inadequate do not excuse prisoners from exhausting them. The failure to provide damages does not mean the remedy is not "available" for a prisoner seeking damages; the statutory term refers only to whether a remedy exists.

Alexander v. Hawk, 159 F.3d 1321 (11th Cir. 1998).

Where a grievance procedure allowed waiver of grievance time limits based on "good cause," a prisoner whose grievance was rejected as untimely and did not apply for waiver of the time limits failed to exhaust.

Harper v. Jenkin, 179 F.3d 1311 (11th Cir. 1999).

Failure to sign and date a grievance is not a failure to exhaust where the written procedures do not require signing or dating. Failure to appeal was not a failure to exhaust where the grievance decision said the prisoner had no right to appeal.

Miller v. Tanner, 196 F.3d 1190 (11th Cir. 1999).

The exhaustion requirement is satisfied by a "good faith, bona fide effort to comply" with administrative procedures (arguably dictum–this prisoner did not correct his procedural mistake even when so instructed).

Zolicoffer v. Scott, 55 F.Supp.2d 1372, 1375 (N.D.Ga. 1999), *aff'd*, 252 F.3d 440 (11th Cir. 2001).

Prisoners need not necessarily name all defendants in their grievances. "Instead, we conclude that while § 1997e(a) requires that a prisoner provide as much relevant information as he reasonably can in the administrative grievance process, it does not require that he do more than that." (1207) But if the plaintiff knows staff members' identity, failure to name them in the grievance may bar suit against them. (1208 n. 3) This does not apply to the warden and commissioner, named in the lawsuit mainly to seek discovery and identify the real miscreants, since everybody already knows who the warden and commisioner are.

Brown v. Sikes, 212 F.3d 1205 (11th Cir. 2000).

Use of force claims are prison conditions claims that must be exhausted. Futility is not a justification for not exhausting. The exhaustion statute is not unconstitutionally vague.

Higginbottom v. Carter, 223 F.3d 1259 (11th Cir. 2000).

The court has acknowledged but not decided the question whether the statute of limitations is tolled until exhaustion is completed.

Leal v. Georgia Dep't of Corrections, 254 F.3d 1276, 1280 (11th Cir. 2001).

Exhaustion is a threshold matter, and a district court must dismiss a suit if the plaintiff has not exhausted. The Eleventh Circuit has not decided whether PLRA exhaustion is jurisdictional. A class action is exhausted when one or more class members has exhausted as to each claim raised by the class.

Chandler v. Crosby, 379 F.3d 1278, 1286-87 (11th Cir. 2004).

A claim that prisoners did not know and were not notified of the prison grievance system does not excuse exhaustion in light of evidence that information about it was routinely provided to prisoners.

Edwards v. Alabama Dept. of Corrections, 81 F.Supp.2d 1242, 1256 (M.D.Ala. 2000).

A prisoner who exhausted his religious exercise claim before the passage of the Religious Land Use and Institutionalized Persons Act did not exhaust his claim under that statute. "While a prisoner is not required to identify a formal legal theory in his grievance, the administrative resolution of the 'problem' cannot occur if the law governing the problem has yet to take effect."

Wilson v. Moore, 2002 WL 950062 at *6 (N.D.Fla., Feb. 28, 2002).

A litigant who is successful at an early stage of the grievance process need not pursue it further. ". . . [N]othing in the Prison Litigation Reform Act requires a prisoner to pursue administrative remedies beyond the point of complete success."

Bolton v. U.S., 347 F.Supp.2d 1218 (N.D. Fla. 2004).

V. Mental or Emotional Injury

Physical injury must be more than *de minimis* but need not be significant to meet the statute's requirement. It does not include "physical manifestations of purely mental or emotional injury." (1286) Here: "A 'dry shave,' without more, is simply not the kind of 'injury' that is cognizable under section 1997e(e)." (1287)

The mental/emotional injury provision is not unconstitutional as applied to claims for compensatory and punitive damages. It is a limitation on damages only, not declaratory and injunctive relief, and the Constitution does not require a damages remedy for constitutional violations (1289). The provision does not affect the right of court access; it just affects the remedies prisoners may seek.

Harris v. Garner, 190 F.3d 1279 (11th Cir. 1999), *vacated in part and reinstated in pertinent part*, 216 F.3d 970 (11th Cir. 2000) (en banc).

Dismissal under this provision should be without prejudice to re-filing after release.

Harris v. Garner, 216 F.3d 970, 980 (11th Cir. 2000) (en banc).

The statute does not apply to a case removed to federal court and solely alleging state law claims unrelated to prison conditions (1315). It remains unclear whether a removed action with federal law and/or prison conditions claims would be subject to the statute. Claims for physical injury must be "greater than de minimis" to avoid dismissal under this statute.

Mitchell v. Brown & Williamson Tobacco Corp., 294 F.3d 1309 (11th Cir. 2002).

A claim arising from a previous period of incarceration, unrelated to the present incarceration, was nevertheless about mental or emotional "injury suffered while in custody," and was subject to § 1997e(e).

Napier v. Preslicka, 314 F.3d 528, 534 (11th Cir. 2002).

Note: The plaintiff's claim was for arrest without probable cause. The court did not hold that this was a "mental or emotional injury"; the plaintiff pled it that way and the court accepted the characterization.

Nominal damages may be awarded for constitutional violations notwithstanding the mental/emotional injury provision.

Hughes v. Lott, 350 F.3d 1157 (11th Cir. 2003).

Note: This plaintiff alleged that after arrest he was forced to strip down to his underwear, sit in the cold for an extended period, and then answer questions at the police station, still wearing only his underwear. The plaintiff *conceded* § 1997e(e)'s applicability; the court did not address the question.

Sexual assault meets the physical injury requirement. "Any physical force which causes the human body to convulse in vomiting and to go into shock has caused a physical injury as intended by § 1997e(e)." The physical force at issue, even if *de minimis* from a purely physical perspective, is "repugnant to the conscience of mankind" and clearly intended by Congress to be actionable notwithstanding § 1997e(e).

Kemner v. Hemphill, 199 F.Supp.2d 1264, 1271 (N.D.Fla. 2002)

VI. Attorneys' Fees

The PLRA attorneys' fees restrictions in 42 U.S.C. § 1997e(d) apply to suits "brought by a prisoner" regardless of whether they are about prison conditions. The restrictions do not deny equal protection. Fees on fees may be awarded under the PLRA.

Jackson v. State Board of Pardons and Paroles, 331 F.3d 790 (11th Cir. 2003).

Attorneys' fees are not prospective relief. Fees for monitoring an injunction are governed by the PLRA restrictions.

Carruthers v. Jenne, 209 F.Supp.2d 1294, 1297-1300 (2002).

VII. Filing Fees and Costs

The PLRA filing fee provisions do not deny equal protection. Insofar as they are inconsistent with the Federal Rules of Appellate Procedure, the latter are amended.

Mitchell v. Farcass, 112 F.3d 1483 (11th Cir. 1997).

Every prisoner has to pay a separate filing fee; further, each must file a separate complaint under the PLRA, notwithstanding the joinder rules.

Hubbard v. Haley, 262 F.3d 1194 (11th Cir. 2001).

An indigent prisoner must pay the initial filing fee "when funds become available," even if the account has less than $10.00; "the ten-dollar rule of § 1915(b)(2) applies only after the initial partial filing fee is paid." (1320) Before dismissing a complaint for failure to pay an initial partial filing fee, the court should find out whether the plaintiff tried to pay. The court endorses including a consent form in the *in forma pauperis* application, which allows the district court to direct the prison to send

the money and avoiding issues of non-payment.

Wilson v. Sargent, 313 F.3d 1315, 1320 (11th Cir. 2002) (per curiam).

VIII. Three Strikes Provision

The three strikes provision does not deny access to courts, it just makes prisoners pay up front. It does not violate the separation of powers since it is a procedural rule and not a rule of decision, recognizes the force of courts' final judgments, and does not enmesh the courts in "petty" tasks. It does not deny due process or equal protection and it is not impermissibly retroactive.

The court counts as a strike a case that was dismissed for failure to exhaust administrative remedies because it is "tantamount to one that fails to state a claim upon which relief may be granted." (731) A dismissal without prejudice for lying about the existence of a prior lawsuit is a strike; although the court did not characterize it as frivolous or malicious, dismissal for this kind of abuse is precisely what Congress had in mind.

Rivera v. Allin, 144 F.3d 719 (11th Cir. 1998).

The three strikes provision does not violate the prohibition against ex post facto laws. It does not deny them access to courts, but merely requires them to pay the fee immediately. The existence of "imminent danger of serious physical injury" is not to be assessed either as of the time of filing the complaint or appeal or as of the time of seeking IFP status, not as of the events described in the complaint.

Medberry v. Butler, 185 F.3d 1189, 1192-93 (11th Cir. 1999).

The allegations of the complaint are considered as a whole in assessing the danger of serious physical injury, and a prisoner complaining of withdrawal of treatment for HIV and hepatitis meets the standard.

Brown v. Johnson, 387 F.3d 1344, 1350 (11th Cir. 2004).

When a court denies IFP based on the three strikes provision, it should also dismiss the complaint without prejudice, rather than just let the prisoner pay, since the statute says that the filing fee must be paid at the initiation of suit.

Dupree v. Palmer, 284 F.3d 1234, 1236 (11th Cir. 2002).

IX. Screening and Dismissal

The PLRA provisions concerning dismissal of cases that are frivolous, fail to state a claim, or seek monetary relief against an immune defendant apply to cases pending when the statute was passed.

Mitchell v. Farcass, 112 F.3d 1483 (11th Cir. 1997).

The PLRA made dismissal of frivolous or malicious claims mandatory and not discretionary, and extended the dismissal authority to cases that do not state a claim. The latter dismissals are reviewed

de novo, but the former continue to be reviewed for abuse of discretion.

Bilal v. Driver, 251 F.3d 1346 (11th Cir. 2001).

Dismissal *sua sponte* under 28 U.S.C. § 1915(a)(b)(1) is reviewed *de novo*, since the language tracks § 1915(e)(2)(B)(ii), as to which the court has held the same thing, and also FRCP 12(b)(6).

Leal v. Georgia Dept. of Corrections, 254 F.3d 1276 (11th Cir. 2001).

28 U.S.C. § 1915(e)(2)(B)(ii) does not deny equal protection or due process by permitting *sua sponte* dismissal of indigents' claims.

Vanderberg v. Donaldson, 259 F.3d 1321 (11th Cir. 2001).

The PLRA's amendment to the IFP statutes, 28 U.S.C. § 1915(e)(2)(B)(ii), "does not allow the district court to dismiss an *in forma pauperis* complaint without allowing leave to amend when required by Fed.R.Civ.P. 15." (1260 n.5)

Troville v. Venz, 303 F.3d 1256 (11th Cir. 2002).

The *Troville* holding, though not involving a prisoner, is applicable to prisoners; their claims may not be dismissed *sua sponte* without leave to amend.

Brown v. Johnson, 387 F.3d 1344, 1348-49 (11th Cir. 2004).

The claim of a prisoner not proceeding *in forma pauperis* could not be dismissed under 28 U.S.C. § 1915(e)(2).

Farese v. Scherer, 342 F.3d 1223 (11th Cir. 2003).

XIII. Diversion of Damage Awards

The PLRA provision concerning restitution orders "is not applicable in this case because the parties have reached a private settlement agreement."

Dodd v. Robinson, Civil Action No. 03-F-571-N, Order at *1 (M.D.Ala., Mar. 26, 2004).

POLICE MISCONDUCT UNDER 42 U.S.C. §1983: PRE-SUIT REQUIREMENTS AND BEYOND

by BARBARA A. HEYER, ESQ.

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I. INTRODUCTION

42 U.S.C. §1983 imposes liability upon any person who subjects a citizen of the United States to the deprivation of any rights, privileges, or immunities which are provided by the Constitution of the United States and Federal law. "Section 1983 has been a major force in protecting the individual from countless abuses by the city, county, and state. We have become a more civilized society because of the protections it affords those under police arrest or confined in penal institutions." Hernandez v. Denton, 861 F.2d 1421, 1427-8 (9th Cir. 1988).

It is at the core of police misconduct suits that:

> "it... is the manner of enforcement which gives §1983 its unique importance, for enforcement is place in the hands of people. Each 'citizen' acts as a private attorney general who 'takes on the mantel of the sovereign' [footnote omitted] guarding for all of us the individual liberties enunciated in the Constitution. Section 1983 represents a balancing feature in our governmental structure whereby individual citizens are encouraged to police those who are charged with policing us all. Thus, it is of special import that suits brought under this statute be resolved by a determination of the truth rather than by a determination that the truth shall remain hidden. [footnote omitted]."
> Wood v. Breir, 54 F.R.D. 7, 10-11 (E.D. Wis. 1972).

II. NOTICE AND PRE-SUIT DISCOVERY REQUIREMENTS

In Florida, any state action against a state or local agency which involves a state tort requires notice to the agency under §768.28, Florida Statutes. While such a notice is not required

for a Section 1983 action based solely on Federal law where issues exist which may involve a recognized state tort, notice should be provided to the agency. (Exhibit A, sample notice). Pre-suit investigation and discovery will determine the necessity of pendent state tort claims.

Under the Federal Tort Claims Act, suits brought against the United State Government require an administrative procedure for the initial review of the claim. An administrative claim must be filed within two years after the claim accrues and no suit may be brought until six months after the claim has been filed with the appropriate federal agency. 28 U.S.C. §2675; McNeil v. United States, 508 U.S. 106 (1993).

Whether the incident in question involves a state or federal agency, pre-suit discovery is vital in properly preparing the complaint.

Documents pertaining to the incident at issue may be obtained from the appropriate Federal agency, pursuant to the Freedom of Information Act. Said agency will require that the client execute a "Privacy Act Declaration," to ensure that the requested documents are not being provided to unauthorized persons.

Where the incident involves a state agency, a request for documents falls under Chapter 119, Florida Statutes. (Exhibit B, sample request). The Public Records Act should be "construed

liberally in favor of openness, and all exemptions from disclosure are to be construed narrowly and limited to their designated purpose. Weeks v. Golden, 798 So.2d 848 (1st DCA 2001) citing to City of Riviera Beach v. Barfield, 642 So.2d 1135, 1136 (Fla. 4th DCA 1994). A failure to produce the requested documents by the state agency could subject it to attorney fees and costs. Barfield, supra; Mazer v. Orange County, 26 Fla.L.Wkly. D2963 (December 14, 2001, 5th DCA).

III. THE BASIS OF MUNICIPAL LIABILITY

The United States Supreme Court has held that when a municipal policy or custom of some nature is the cause of unconstitutional violations by municipal employees, the municipality itself is liable. Monell v. Department of Social Services, 436 U.S. 658 (1979). "[L]ocal governments, like every other Section 1983 'person' by the very terms of the statute, may be sued for constitutional deprivation, visited pursuant to governmental 'custom' even though such a custom has not received formal approval through the body's official decision-making channels. Policy is not limited merely to formally adopted ordinances or resolutions." Id. at p. 691. It may also be demonstrated by the governing body's knowledge or the acquiescence in the acts of its individual officers. Thomas v. Sams, 734 F.2d 185, 193 (5th Cir. 1984), petition for rehrg.

denied, 741 F. 2d 783 (1984), cert denied, 472 U.S. 1017, 105 S.Ct. 3476 (1985). "[L]iability will attach for 'constitutional deprivations visited pursuant to governmental 'custom' even though such a custom has not received formal approval through the [municipality's] official decisionmaking channels.'" (emphasis added). Church v. City of Huntsville, 30 F. 3d 1332, 1342-3 (11th Cir. 1994), citing to Monell, supra at p. 690-1.

The custom or practice will be attributed to the agencies when the "duration and frequency of the practices warrants a finding of either actual or constructive knowledge by the ...governing body [or policymaker with responsibility for oversight and supervision] that the practices have become customary among its employees." Spell v. McDaniel, 824 F.2d 1380, 1387 (4th Cir. 1987). "Unlike a 'policy,' which comes into existence because of the top-down affirmative decision of a policymaker, a custom develops from the bottom-up. Thus, the liability of the municipality for customary constitutional violations derives not from its creation of the custom, but from its tolerance of or acquiescence in it." Britton v. Maloney, 901 F.Supp. 444, 450 (D. Mass. 1995).

> "Plaintiffs were not obligated to produce particular evidence that defendants had specific knowledge of a declared policy of the [municipality] and acted on this knowledge in promoting the malicious prosecution of plaintiffs. This is only one method - and not the exclusive one - of establishing the necessary link between municipal practice and individual behavior. The critical question here is whether there is

> sufficient evidence in the record of municipal policy, custom or practice, so that a jury could reasonably infer that the individual conduct in this case was causally connected to the policy."

Gentile v. City of Suffolk, 926 F.2d 142, 152 (2nd Cir. 1991).

Policymaking under §1983 usually appears in four forms. First, policymaking may be in the form of conventional lawmaking, such as when an ordinance is passed. Second, it may consist of a "widespread custom or practice that the final policymakers have expressly or tacitly endorsed. Third, policymaking may consist of a single decision by the final policymaking authority to pursue a particular course of action. (Citation omitted). Finally, policymaking may consist of the failure of policymakers to adequately screen, supervise, or train employees." Walcott v. City of St. Petersburg, 2000 WL 782085 at *7 (M.D. Fla., 2000); Brown v. City of Margate,842 F.Supp.515 (S.D. Fla. 1993); Jett v. Dallas Indep. Sch. Dist., 491 U.S. 701 (1989); Hopper v. City of Pasco, 241 F.3d 1067 (9th Cir. 2001); Ulrich v. City and County of San Francisco, 308 F.3d 968 (9th Cir. 2002).

"The continued failure of the city to prevent known constitutional violations by its police force is precisely the type of informal policy or custom that is actionable under Section 1983." Depew v. City of St. Marys, Georgia, 787 F.2d 1496 (11th Cir. 1986). A persistent failure to take disciplinary action against officers can give rise to the inference that a municipality has ratified conduct, thereby

establishing a "custom" within the meaning of Monell. Batista v. Rodriguez, 702 F.2d 393, 397 (2d Cir. 1983); Fundiller v. City of Cooper City, 777 F.2d 1436 (11th Cir. 1985). "[A] local governmental body may be liable if it has a policy of inaction and such inaction amounts to a failure to protect constitutional rights." Gibson v. County of Washoe, 290 F.3d 1175 (9th Cir. 2002).

Moreover, a municipality's legislative or governing body is not the sole source of municipal policy for purposes of Section 1983 liability. Those high ranking municipal officials "whose edicts and acts may fairly be said to represent official policy" may by their actions subject the governmental entity to liability under Section 1983. Monell, supra at p. 694. The municipality, of necessity, acts through its agents. Reed v. Village of Shorewood, 704 F.2d 943, 953 (7th Cir. 1983).

A policymaker is an official who bears final authority or who is the "ultimate repository of power" within his or her sphere of responsibility. Rookard v. Health and Hospitals Corp., 710 F.2d 41, 45 (2nd Cir. 1983) ("where an official has final authority over significant matters involving the exercise of discretion, the choices he makes represent government policy.").

Policy-making authority may be ascertained in various ways. It may be granted by status. City of St. Louis v. Praprotnik, 108 S.Ct. 915 (1988); Thomas, supra at p. 784. Alternatively,

such authority may be inferred from one's title. Rookard, supra at p. 45 and n.4. Final authority with respect to particular goals or actions may be delegated to an official by the governing body of the municipality. Shelton v. City of College Stanton, 754 F.2d 1251, 1257-58 (5th Cir. 1985) (city liable for unconstitutional acts of zoning board to grant or deny variances); Williams v. Butler, 746 F.2d 431, 438 (8th Cir. 1984) (if official is delegated authority, directly or indirectly, to act on behalf of the governing body, and if official's decision is effectively final, his acts are those of the governing body).

An official has "final authority" if his decisions are, in practice or by law, final. Williams, supra at p. 438; Rookard, supra at p. 45; Marchese v. Lucas, 758 F.2d 181 (6th Cir. 1985); O'Callahan v. District of Columbia, 741 F.Supp. 273 (D.D.C. 1990). Where there is no internal procedure within the municipal government by which to appeal an individual official's decision, that decision and the authority to make it are deemed final. Williams, supra at p. 438; Shelton, supra at p. 1257-58 (no review by city council of the decision to grant or deny zoning variance); McKinley v. City of Eloy, 705 F.2d 1110, 1116 (9th Cir. 1983) (city manager had "ultimate responsibility" for those actions which did not require city council approval).

Where an official's actions or decisions are subject to review by the governing body or an appellate entity, they may

still represent municipal policy if the reviewing body fails to exercise its right of review, or if it rarely, if ever, overrules such official's decisions. Wilson v. Taylor, 733 F.2d 1539, 1546-47 (11th Cir. 1984).

> "[T]o sustain a §1983 action against the City, plaintiffs must simply establish a municipal custom coupled with causation - i.e., that policymakers were aware of similar unlawful conduct in the past, but failed to take precautions against further violations and that this failure, at least in part, led to their injury. If the City is shown to have tolerated known misconduct by police officers, the issue whether the City's inaction contributed to the individually officers' decision to arrest the plaintiffs unlawfully in this instance is a question of fact for the jury." (emphasis added).

Bielevicz v. Dubinon, 915 F.2d, 845, 851 (3rd Cir. 1990).

The Fourth Circuit has stated that:

> "A sufficiently close causal link between... a known but uncorrected custom or usage and a specific violation is established if occurrence of the specific violation was made reasonably probable by permitted continuation of the custom." (emphasis added).

Spell, supra at 1381, cert. nom City Of Fayetteville v. Spell, 484 U.S. 1027, 108 S.Ct. 752, 98 L.Ed. 2d 765 (1988).

The quality and outcome of investigations of police misconduct are matters that are common knowledge within a police department. The importance that the policymakers place on such investigations is also common knowledge within a police department. The fact that investigations are designed to, or result in, the covering up of misconduct is also something that

is common knowledge within a police department.

Control is the obvious key to any good police department. If officers know that the investigations by the Department are not going to be thorough and if they know that they will not be appropriately disciplined, the belief that they are above the rules and above the law is inevitable. The lack of review of documentation, the lack of thorough investigations, the failure to document the conduct of the officers by way of objective evaluations means that supervisors cannot know what is going on with respect to their police department, making it foreseeable that the constitutional rights of citizens would be violated. If a department's internal review procedures are designed to cover up acts of misconduct and are inadequate to inform supervisors of the wrongdoing of subordinates, the supervisors and/or City will be held liable, if they knew or should have known of the situation. Black v. Stephens, 662 F.2d 181 (3d Cir. 1981); Brown, supra; Bordanaro v. McLeod, 871 F.2d 1151 (1st Cir. 1989).

"Plaintiffs [in police misconduct cases] are likely to encounter hostile witnesses and incomplete documentation of past abuses." Bordanaro, supra at 1157, n.5, citing to Grandstaff v. City of Borger, 767 F.2d 161, 171 (5th Cir. 1985) cert. denied, 480 U.S. 916. "[I]f the city's efforts to evaluate the claims were so superficial as to suggest that its official attitude was one of indifference to the truth of the claim, such an attitude

would bespeak an indifference to the rights asserted in those claims... Proof that claims were met with indifference for their truth may be one way of satisfying the plaintiff's burden." Fiacco v. City of Rensselaer, N.Y., 783 F.2d 319, 328 (2d Cir. 1986).

How records of complaints and internal investigations are handled is important in evaluating the agency's responsibility. "We have previously noted that evidence that a law enforcement agency routinely failed to log citizen complaints may, along with other evidence, permit an inference that the agency was deliberately indifferent to the rights of citizens. See Vineyard v. County of Murray, GA., 990 F.2d 1207, 1212 (11th Cir. 1993)." Thomas v. Roberts, 261 F.3d 1160, 1176 (11th Cir. 2001). Deliberate indifference may be inferred if citizen complaints are followed by no meaningful attempt on the part of the agency to investigate them or to forestall further incidents. Vann v. City of New York, 72 F.3d 1040, 1051 (2nd Cir. 1995); see also: Gold v. City of Miami, 151 F.3d 1346, 1353 (11th Cir. 1998).

> "It is not enough that an investigative process be in place... 'The investigative process must be real. It must have some teeth. It must answer to the citizen by providing at least a rudimentary chance of redress when injustice is done. The mere fact of investigation for the sake of investigation does not fulfill a city's obligation to its citizens'.... Formalism is often the last refuge of scoundrels."

Beck v. City of Pittsburgh, 89 F.3d 966, 974 (3d Cir. 1996).

In the absence of appropriate supervision, patrol officers will grow to feel that their actions are not monitored and will in predictable ways, exceed the limits of proper police behavior. Such evidence provides a finding that a municipality is guilty of constructing "a disciplinary system that was going through the procedural motions without any real objective of finding the truth." Gutierrez-Rodriguez v. Cartagena, 882 F.2d 553, 582 (1st Cir. 1989). See also: Larez v. City of Los Angeles, 946 F.2d 630 (9th Cir. 1991).

It is clearly established that failure to properly act with respect to training, supervision and/or discipline is actionable under 42 U.S.C. §1983. City of Canton v. Harris, 109 S.Ct. 1197, 1200 (1989); Brown, supra; Kerr v. City of West Palm Beach, 875 F.2d 1546 (11th Cir. 1989); Bordanaro, supra; Mitchell v. Aluisi, 872 F.2d 577 (4th Cir. 1989); Perez v. Simmons, 859 F.2d 708 (D.C. Cir. 1988); Parker v. District of Columbia, 850 F.2d 708, 712 (D.C. Cir. 1988) Cert. denied 109 S.Ct. 1339 (1989); Grandstaff, supra; Rymer v. Davis, 775 F.2d 756 (6th Cir. 1985) cert. denied 480 U.S. 916 (1987); Kibbe v. City of Springfield, 777 F.2d 801 (1st Cir. 1985) rehrg. denied 481 U.S. 1033 (1987); Marchese, supra, 188-189; Voutour v. Vitale, 761 F.2d 812 (1st Cir. 1985) cert. denied 474 U.S. 1100 (1986); Wellington v. Daniels, 717 F.2d 932, 936 (4th Cir. 1983); Hays v. Jefferson County, 668 F.2d 869, 874 (6th Cir. 1982); Herrera v. Valentine,

653 F.2d 1220, 1224 (8th Cir. 1981); Owens v. Haas, 601 F.2d 1242, 1246-47 (2nd Cir. 1979) cert. denied, 444 U.S. 980 (1979).

Under this theory, a municipality is liable either for failing to implement a program that was grossly inadequate to prevent the type of harm suffered by the plaintiffs. Voutour, supra at p. 820. The plaintiffs must demonstrate that the failure to train, supervise, and/or discipline amounts to a deliberate indifference to the rights of persons with whom the police come into contact. Brown, supra; City of Canton, supra at 1204; Wellington, supra; Laguirand v. Hayden, 717 F.2d 220, 227-28 (5th Cir. 1983) cert. denied 467 U.S. 1215 (1984). However, in order for such liability to attach, the deficiency must be closely related to the injury sustained. City of Canton, supra at p. 1206; Brown, supra.

Proof of even a single incident of unconstitutional activity may be sufficient to impose liability if the proof of the incident shows that it was caused by an existing, unconstitutional municipal policy. City of Oklahoma v. Tuttle, 471 U.S. 808, 105 S.Ct. 2427 (1985) rehrg. denied 473 U.S. 925 (1985). "...[A] single, unusually excessive use of force may be sufficiently out of the ordinary to warrant an inference that it was attributable to inadequate training or supervision amounting to 'deliberate indifference' or 'gross negligence' on the part of the officials in charge." Id. at p. 979; Turpin v. Mailet, 619

F.2d 196, 202 (2nd Cir. 1980). A municipality may be held liable under 42 U.S.C. §1983 for a single decision whether or not a similar action had been taken in the past or intended to do so in the future "...because even a single decision by such a body unquestionably constitutes an act of official government policy." Pembaur v. City of Cincinnati, 106 S.Ct 1292, 1296 (1986). See also: Owen v. City of Independence, 445 U.S. 622 (1980) and Newport v. Fact Concerts, Inc., 453 U.S. 247 (1981). However, the Supreme Court has stated that "...our decision in [Canton] makes clear, 'deliberate indifference' is a stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action." Board of County Comm. of Bryan County v. Brown, 520 U.S. 397, 410-11 (1997).

A municipality's failure to have adequate complaint investigation procedures and systems for properly handling complaints are most certainly a "moving force" behind the constitutional violations of a plaintiff. The court in Vineyard, citing to City of Canton, stated that the proper inquiry is:

> "'Would the injury have been avoided had the employee been trained [and supervised and disciplined] under a program that was not deficient in the identified respect[s]?'" ... The testimony of Professor White supports the jury's finding of causation. When asked to assume Vineyard's version of what occurred at the hospital to be true, Professor White offered his opinion that these events would not have occurred if the county policies were such that officers knew they must report any confrontations, that others could call the Sheriff's Department to

> report complaints to the department, and that the department would investigate the complaints. The purpose of such policies, White explained is to stop the use of gratuitous force. He also opined that without at least 'the minimum policies in effect to measure [police] behavior and to address problems when they arise, then it's my opinion that it's not if abuses will occur, it's when they're going to occur ...'"

Id. at 1213.

When a municipality or its officials fail to discipline or supervise a particular officer, knowing his or her propensity for misconduct, liability may arise for subsequent misconduct. Cattan v. City of New York, 523 F.2d 598, 601 (S.D.N.Y. 1981). "A city may be held responsible where the authorized policymakers 'approve a subordinate's decision and basis for it.'" (Hill v. Clifton, 74 F.3d 1150, 1152 (11th Cir. 1996)); Ortega v. Christian, 85 F.3d 1521 (11th Cir. 1996).

In Vann, supra, the court set forth a clear definition, and provided examples, of the type of violations that are "so obvious" as to warrant a finding of municipal liability. There the court stated:

> "To prove such deliberate indifference, the plaintiff must show that the need for more or better supervision to protect against constitutional violations was obvious. See Canton v. Harris 489 U.S. 390. An obvious need may be demonstrated through proof of repeated complaints of civil rights violations; deliberate indifference may be inferred if the complaints are followed by no meaningful attempt on the part of the municipality to investigate or to forestall further incidents. See, e.g., Ricciuti v. N.Y.C. Transit Authority, 941 F.2d

> at 123; Fiacco v. City of Rensselaer, 783 F.2d at 328 ('[w]hether or not the claims had validity, the very assertion of a number of such claims put the City on notice that there was a possibility that its police officers had used excessive force'). Deliberate indifference may also be shown through expert testimony that a practice condoned by the defendant municipality was 'contrary to the practice of most police departments' and was "particularly dangerous" because it presented an unusually high risk that constitutional rights would be violated."

(citations omitted). Vann, supra at 1049.

It is not necessary for an individual policymaker to be found liable for liability to exist against a municipality. Brown, supra. Where a municipality has knowledge or constructive knowledge of the action and/or inaction of its policymakers, such knowledge, participation and approval represent a policy for which they may be held liable under Section 1983. See: Owen, supra at p. 45; Sanders v. St. Louis County, 724 F.2d 665, 668 (8th Cir. 1983); Quinn v. Syracuse Model Neighborhood, 613 F.2d 438, 448 (2nd Cir. 1980).

> "Police officers must comport themselves in accordance with the laws that they are sworn to enforce and behave in a manner that brings honor and respect for rather than public distrust of law enforcement personnel ... In accepting employment by the public, they implicitly agree that they will not engage in conduct which calls into question their ability and fitness to perform their official responsibilities."

Bordanaro, supra citing to Police Comm'r of Boston v. Civil Serv. Comm'n, 22 Mass. App.Ct. 364, 494 N.E. 2d 27, 32 review denied, 398 Mass. 1103, 497 N.E. 2d 1096 (1986).

A municipality may be held liable if the department's internal review procedures are designed to, or result in, the cover up of acts of misconduct, and are inadequate to inform supervisors of the wrongdoing of subordinates. Black, supra; See also: McClelland, supra; Brown, supra at 516.

The evidence of prior misconduct, coupled with the destruction of crucial documents which would provide the agency with information concerning its supervision, training and discipline, may provide the basis for municipal liability. Municipal liability applies when "the municipality itself wreaks injury on its citizens." Walker v. City of New York, 974 F.2d 293, 301 (2d Cir. 1992). "Policymakers know to a moral certainty that police officers will be presented with opportunities to commit perjury or proceed against the innocent...[and that] a failure...to resist these opportunities will almost certainly result in injuries to citizens." Walker, supra at 299-300. Therefore, "[w]here the proper response... is obvious to all without training or supervision, then the failure to train or supervise is generally not 'so likely' to produce a wrong decision as to support an inference of deliberate indifference by city policymakers to the need to train or supervise." Sewell v. Town of Lake Hamilton, 117 F.3d 488, 490 (11th Cir. 1997) citing to Walker, supra.

IV. THE FEDERAL TORT CLAIMS ACT ACTIONS AGAINST THE UNITED STATES GOVERNMENT

The Federal Tort Claims Act waives the sovereign immunity of the United States, thereby permitting suits for damages for certain acts and/or omissions by federal government employees. (28 U.S.C. §1346(b), §2671). Under 28 U.S.C. §2680(h), liability of the United States extends to intentional torts of assault, battery, false imprisonment, false arrest, abuse of process, and malicious prosecution, when committed, by federal government employees. Gasho v. United States, 39 F.3d 1420 (9th Cir. 1994). 28 U.S.C. §1346(b) vests the Court with exclusive jurisdiction of tort claims "where the United States, if a private person, would be liable to the claimant in accordance with the law of the place were the act or omission occurred." The tort which forms the basis of the suit must be recognized by the law of the state in which it occurred. Richard v. United States, 369 U.S. 1 (1962); Spock v. United States, 464 F.Supp.510 (S.D.N.Y. 1978); Rhoden v. United States, 55 F.3d 428 (9th Cir. 1995).

As with municipalities, the United States government is immune from a punitive damage awards. Fact Concerts, Inc. v. City of Newport, 626 F.2d 1060 (1st Cir. 1980) overruled on other grounds, 453 U.S. 247 (1981). Additionally, neither municipalities nor the United States government can avail themselves of the qualified immunity defense when sued under 42

U.S.C. §1983. Owen, supra; Castro v. United States, 34 F.3d 106 (2d Cir. 1994).

THE DEFENSE OF QUALIFIED IMMUNITY FOR FEDERAL OFFICERS INVOLVED IN SEARCHES AND SEIZURES

In Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971), the United States Supreme Court ruled that a cause of action for damages against federal agents may also be brought directly under the Fourth Amendment for violations of one's constitutional right to be free from an unlawful search, even in the absence of a statute authorizing suit. Federal officers will be held liable under the Fourth Amendment to the United States Constitution for conduct which is neither discretionary nor reasonable.

"The Fourth Amendment proscribes only 'unreasonable' searches and seizures. However, the reasonableness of a search or a seizure depends 'not only on when it is made, but also on how it is carried out." (emphasis added). Franklin v. Foxworth, 31 F.3d 873, 875 (9th Cir. 1994), quoting Tennessee v. Garner, 471 U.S. 1, 7-8, 105 S.Ct. 1694, 1699, 85 L.Ed.2d 1 (1985). Even if a search or seizure is supported by probable cause, it may be invalid if carried out in an unreasonable fashion. Id. at 875. The test of "reasonableness" applies to the manner in which the authorities conduct any seizure, including the limited detentions

of the type imposed on a plaintiff. "A detention connected with a search may be unreasonable if it is unnecessarily painful, degrading, or prolonged, or if it involves an undue invasion of privacy. Detentions, particularly lengthy detentions, of the elderly, or of children, or of individuals suffering from a serious illness or disability raise additional concerns." Id. at 876. In determining the reasonableness of a plaintiff's detention and treatment, the courts must conduct an analysis from the perspective of a reasonable customs officer on the scene. "..[I]t is not only the length of the detention but also the treatment afforded the detainee during the detention that offends constitutional principles." Id. at 877. Federal defendants are required to provide an a reasonable articulable basis for engaging in the type of physical intrusion of a detainee, particularly where the individual has some physical disability which places them at risk. Qualified immunity will not provide a defense where the federal officers "conducted the detention...in a wholly unreasonable manner-a manner that wantonly and callously subjected an obviously ill and incapacitated person to entirely unnecessary and unjustifiable degradation and suffering." Id. at 878. The Fourth Amendment of the United States Constitution requires that the greater the intrusion, the greater must be the reason for conducting such a search. Blackburn v. Snow, 771 F.2d 556, 565 (1st Cir. 1985); United States v. Vega-Barvo, 729 F.2d

1341, 1344, 1346 (11th Cir. 1984); United States v. Wardlaw, 576 F.2d 932, 934 (1st Cir. 1978).

The extent to which an intrusion may threaten the health and safety of an individual is a crucial factor in assessing the magnitude of the intrusion. Winston v. Lee, 470 U.S. 753, 761 (1985). Absent exigent circumstances, body cavity searches require probable cause and a search warrant. Fuller v. M.G. Jewelry, 950 F.2d 1437 (9th Cir. 1991); Salinas v. Breier, 695 F.2d 1073 (7th Cir. 1982).

The search and seizure by federal officers must be based upon articulable and appropriate guidelines when detaining and searching individuals coming into the United States. A set of "factors" to justify the unreasonable search and seizure of persons simply based upon the race of the suspect and based upon the bias or prejudice of the detaining official is improper. As pointed out in Garcia v. United States, 913 F.Supp. 905, 915 (E.D. Penn. 1996), "[w]e are alert to the danger that by merely listing several innocuous "factors" together law enforcement officers may support a 'reasonable suspicion' in virtually every case. See: U.S. v. Sokolow, 490 U.S. 1, 13, 109 S. Ct. 1581, 1589 (1989) (observing profile's "chameleon-like way of adapting to any particular set of observations.").

Strip searches and internal examinations of a detainee is an extreme invasion of privacy and requires a more stringent

standard than mere suspicion. United States v. Mendenhall, 446 U.S. 544 (1980); Bell v. Wolfish, 441 U.S. 530, 558 (1979); Arruda v. Fair, 710 F.2d 886, 887 (1st Cir. 1983). "[S]trip searches involving the visual inspection of the anal and genital areas [are] 'demeaning, dehumanizing, undignified, humiliating, terrifying, unpleasant, embarrassing, repulsive, signifying degradation and submission.'" (citations omitted). Mary Beth G. v. City of Chicago, 723 F.2d 1263 (7th Cir. 1983).

While wide latitude is given to Customs officers at borders, strip searches and body cavity examinations may not be employed unless appropriate criteria have been met. United States v. Montoya de Hernandez, 473 U.S. 531 (1985). Federal officers are not protected by qualified immunity for conduct which unreasonably subjects a detainee to external and internal examinations. Brent v. Ashley, 247 F.3d 1294 (11th Cir. 2001).

By 1978, the Fifth Circuit had clearly established that reasonable suspicion was necessary to justify a strip search and that the fruitless pat-down and luggage search would preclude a further strip search. United States v. Afanador, 567 F.2d 1325 (5th Cir. 1978) as cited in Brent, supra at p. 1303-05. It is also clear that by 1980, the Supreme Court, in Reid v. Georgia, 448 U.S. 438 (1980), rejected blind reliance on a "general drug courier profile" to justify a clearly intrusive search.

In an analogous and pointed decision by the Eleventh

Circuit, reviewing a section 1983 case on a summary judgment determination of qualified immunity, it was held that "generalized and unparticularized reasons [to justify a strip search] . . . constitutes a Fourth Amendment violation." Brent, supra at p. 1300.

A 'general courier profile' alone does not provide reasonable suspicion. Brent, supra at p. 1304, citing Reid, supra at p. 441. Although a profile may have some utility, the Fifth Circuit has clearly found that it "cannot countenance its use to perform plastic surgery disfiguring the Fourth Amendment.... In a civilized society, one's anatomy is draped with constitutional protections. The Fourth Amendment does not permit us to give border agents a freer hand or a more probing eye." Afanador, supra at p. 1330, n. 6. Simply arriving from a source country does not give rise to reasonable suspicion that an individual traveler is a drug courier. Brent, supra, citing to Reid, supra and United States v. Grant, 920 F.2d 376, 386 (6th Cir. 1990).

V. CONSTITUTIONAL VIOLATIONS FOR IMPROPER MEDICAL TREATMENT

No qualified immunity defense is available to a municipality or other similar governmental employer or policymaking individual sued in his official capacity. Owen v. City of Independence, 445 U.S. 622 (1980). Additionally, individuals privately employed by an agency which is under contract with a municipality or governmental agency, such as a hospital, may not be entitled to the defense of qualified immunity. Hinson v. Edmond, 192 F.3d 1342 (11th Cir. 1999). See also: Hinson v. Edmond, 205 F.3d 1264 (11th Cir. 2000). This is true where the individuals have sole control over medical judgment, where the policies and procedures for medical care were established and implemented by the medical entity, and where disciplining and supervision of the medical staff are not the responsibility of the government agency. Id. at p. 1347. Therefore, "the public policy reasons for qualified immunity do not justify the extension of qualified immunity in this case." Id. at p. 1346.

"[A] physician who is under contract with the state to provide medical treatment to inmates at a state prison hospital acts 'under color of state law,' and is therefore subject to suit under §1983." Mitchell v. Aluisi, 872 F.2d 577, 580 (4th Cir. 1989), citing to West v. Atkins, 487 U.S. 42, 108 S.Ct. 2250 (1988).

The law is clearly established that a prisoner has a

constitutional right to adequate medical care. Lewis v. Parish of Terrebonne, 894 F.2d 142 (5th Cir. 1990); Greason v. Kemp, 891 F.2d 829 (11th Cir. 1990).

Deliberate indifference is the standard for evaluating a constitutional claim for improper medical treatment. Deliberate indifference can be demonstrated through either repeated examples of delayed, denied, or inappropriate medical care or one episode of gross misconduct. Estelle v. Gamble, 429 U.S. 97 (1976); Toussaint v. McCarthy, 801 F.2d 1080 (9th Cir. 1986); Rogers v. Evans, 792 F.2d 1052 (11th Cir. 1986); DeShaney v. Winnebago County Dept. of Social Services, 489 U.S. 189 (1989); Helling v. McKinney, 509 U.S. 25 (1993)

When the need for treatment is obvious, medical care which is so cursory as to amount to no treatment at all may amount to deliberate indifference. Mandel v. Doe, 888 F.2d 783, 789 (11th Cir. 1989); Ancata v. Prison Health Services, Inc., 769 F.2d 700, 704 (11th Cir. 1985); McElligot v. Foley, 182 F.3d 1248 (11th Cir. 1999). Additionally, a doctor's decision to take an easier and less efficacious course of treatment constitutes deliberate indifference. Adams v. Poag, 61 F.3d 1537, 1544 (11th Cir. 1995), citing to Waldrop v. Evans, 871 F.2d 1030, 1033 (11th Cir. 1989). A defendant who delays necessary treatment for non-medical reasons may exhibit deliberate indifference. Hill, supra at 1190; H.C. by Hewett v. Jarrad, 786 F.2d 1080, 1086

(11th Cir. 1986); Ancata, supra at 704; Farrow v. West, 320 F.3d 1235, 1246 (11th Cir. 2003). The broad principal of law that deliberate indifference to a prisoner's serious medical needs violates his constitutional rights has long been clearly established. See: Estelle, supra. Only "the scope of that right is, therefore, necessarily defined by case law." Marsh v. Butler County, Alabama, 268 F.3d 1014, 1038 (11th Cir. 2001).

> "A 'serious' medical need is one that has been diagnosed by a physician as mandating treatment or one that is so obvious that even a lay person would easily recognize the necessity for a doctor's attention." (Citations omitted).

Hill v. DeKalb Regional Youth Detention Center, 40 F.3d 1176, 1187 (11th Cir. 1994); Farrow, supra at 1243. Under this analysis, the court must weigh specified criteria in making a determination as to whether the lack of medical care or the treatment given rose to the level of deliberate indifference. [That standard has previously been set forth by the appellate court.] In Howell v. Evans, 922 F.2d 712, 719 (11th Cir. 1991), vacated 931 F.2d 711 (11th Cir. 1991), reinstated by unpublished order (June 24, 1991), the Court stated, that:

> "A medical treatment case is also unique, however, because the standard for deliberate indifference need not depend solely on prior court decisions; the contemporary standards and opinions of the medical profession also are highly relevant in determining what constitutes deliberate indifference to medical care." (Citations omitted).

The Howell court stressed that a plaintiff can prove deliberate indifference in a medical treatment case using two

means: prior legal determinations of deliberate indifference and contemporary medical standards. The latter method envisions the plaintiff producing opinions of medical experts that set forth the official's actions were so grossly contrary to accepted medical practices so as to amount to deliberate indifference. "This latter method of proof often is essential when a doctor's actions are at issue, because the evaluation of medical care is frequently fact-specific and dependent on medical knowledge." Id. "Plaintiffs frequently resort to the contemporary standards of the medical profession when the challenged action required the exercise of medical judgment." Adams, supra at 1543.

Deliberate indifference to a serious medical need is evidenced by the doctors subjective awareness of the risks involved in the medical treatment or lack thereof. Farmer v. Brennan, 511 U.S. 825 (1994). "This court has consistently held that knowledge of the need for medical care and intentional refusal to provide that care constitute deliberate indifference." (Citations omitted). Mandel, supra at 788. Other parameters outlining deliberate indifference were addressed by the court in Adams, supra at p.1543-44, where the failure to provide care to a patient with serious medical needs would strip a doctor of qualified immunity:

> "Our cases have consistently held that knowledge of the need for medical care and an intentional refusal to provide that care constitutes deliberate indifference. [Citations omitted]. Medical treatment that is 'so

> grossly incompetent, inadequate, or excessive as to shock the conscience or to be intolerable to fundamental fairness' constitutes deliberate indifference." [citation omitted] 'A doctor's decision to take an easier and less efficacious course of treatment' also constitutes deliberate indifferent. [citation omitted]. Additionally, when the need for medical treatment is obvious, medical care that is so cursory as to amount to no treatment at all may constitute deliberate indifference. [citation omitted] Also, delay in access to medical care that is 'tantamount to "unnecessary and wanton infliction of pain'", may constitute deliberate indifference to a prisoner's serious medical needs." [citations omitted]

Deliberate indifference to serious medical need has been defined as "medical treatment that is so grossly incompetent, inadequate or excessive as to shock the conscience.... Whether an instance of medical misdiagnosis resulted from deliberate indifference or negligence is a factual question requiring exploration by expert witness." (emphasis added) (citations omitted). Rogers v. Evans, 792 F.2d 1052, 1058 (11th Cir. 1986).

It is not the knowledge of a condition which gives rise to deliberate indifference, but knowledge coupled with refusal to appropriately treat the serious medical condition which gives rise to a claim of deliberate indifference. Howell, supra; Farrow, supra at 1246.

VI. ACCEPTED USES OF EXPERTS IN POLICE LIABILITY MATTERS

Federal Rule of Evidence 702, provides:

> "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case."

"Rule 702 ...assign[s] to the trial judge the task of ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand." Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 594 (1993). See also: Kumho Tire Company, Ltd. v. Carmichael, 526 U.S. 137 (1999). The rejection of expert testimony is the exception, rather than the rule because the "...trial court's role as gatekeeper is not intended to serve as a replacement for the adversary system." Fed.R.Evid. 702, Advisory Committee Notes, 2000 Amendment, quoting United States v. 14.38 Acres of Land Situated in Leflore County, Mississippi, 80 F.3d 1074, 1078 (5th Cir. 1996).

The federal courts have routinely accepted expert testimony with respect to police misconduct matters, both before and after the Supreme Court rulings in Daubert and Kumho. In Daubert, supra, the Supreme Court stated that, with respect to the admissibility of expert testimony, the court's "... inquiry is a

flexible one, and its focus must be solely on principles and methodology, not on the conclusions that they generate.... Cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof, rather than wholesale exclusion under an uncompromising 'general acceptance' standard, is the appropriate means by which evidence based on valid principles may be challenged." Daubert at 2790.

Expert testimony regarding police misconduct is an appropriate means of presenting evidence concerning the liability of a city and/or its policymakers. City of Oklahoma, supra. In such cases, the experts testify concerning the need for proper supervision to curb misconduct by officers, that in the absence of appropriate supervision, officers will grow to feel that their actions are not monitored and will, in predictable ways, including the incident in question, exceed the limits of proper police behavior. Additionally, such experts testify that, based upon the appropriate documentation, a city had constructed a "disciplinary system that was going through the procedural motions without any real objective of finding the truth." Gutierrez-Rodriguez, supra at 582; Larez, supra. An expert can testify that the documentation supports a finding that the discipline, supervision, and/or training in a police department was lax. He or she can then testify to what they believe the consequences of such lax discipline, supervision and/or training

would have on a police department. "Especially in the context of a failure to train claim, expert testimony may prove the sole avenue available to plaintiffs to call into question the adequacy of a municipality's training procedures. To disregard expert testimony in such cases would, we believe, carry with it the danger of effectively insulating a municipality from liability for injuries resulting directly from its indifference to the rights of citizens. Reliance on expert testimony is particularly appropriate where, as here, the conclusions rest directly upon the expert's review of materials provided by the City itself." (Emphasis added). Russo v. City of Cincinnati, 953 F.2d 1036, 1047 (6th Cir. 1992). Such testimony is routinely employed in cases involving municipal liability and allegations of a failure to train, supervise and/or discipline officers. See: City of Oklahoma, supra; Vann, supra, Sherrod v. Berry, 827 F.2d 195 (7th Cir. 1987), rev'd on other grounds, 856 F.2d 802 (7th Cir. 1988)(en banc). Additionally, police experts have been utilized with respect to issues such as the proper method of approaching a suspect (Anthony v. Baker, 767 F.2d 657, 665 (10th Cir. 1985)) and appropriate investigative techniques with respect to police investigations (Hild v. Bruner, 496 F.Supp 93 (D.N.J. 1980)).

Determining the reliability of the proffered expert testimony demands a lower standard than the "merits standard of correctness." In re Paoli R.R. Yard PCB Litigation, 35 F.3d 718,

744 (3d Cir. 1994). In making its determination, the court must examine an expert's conclusions in order to determine whether they could reliably follow from the facts known to the expert and the methodology used. Heller v. Shaw Indus., Inc., 167 F.3d 146, 153 (3d Cir. 1999). If the grounds are good, "the analysis of the expert's conclusions themselves is for the trier of fact when the expert is subject to cross-examination." Kannankeril v. Terminix Internat'l, Inc., 128 F.3d 802, 807 (3d Cir. 1997).

In evaluating the reliability of nonscientific evidence, a court may be required to consider other factors not listed in Daubert, supra. Kumho, supra at p. 1175. There are no definitive guidelines for determining the knowledge, skill or experience required either in a particular case or of a particular witness. Rule 702 of the Federal Rules of Evidence simply provides that the expert acquire his or her expertise through knowledge, skill, experience, training or education. Lauria v. National Railroad Passenger Corp., 145 F.3d 593, 598-9 (3d Cir. 1998).

VII. QUALIFIED IMMUNITY

In Monroe v. Pape, 365 U.S. 167 (1961), the United States Supreme Court held that an officer who, acting under color of law, commits an act resulting in a constitutional deprivation, is liable for damages under 42 U.S.C. §1983.

Under the qualified immunity doctrine, government officials or officials, acting under color of law, who perform discretionary functions, are immune from suit unless the conduct that forms the basis of the suit violates clearly established federal statutory or constitutional rights of which a reasonable person would have known. Harlow v. Fitzgerald, 457 U.S. 800, 102 S. Ct. 2727 (1982). In order for the right to be "clearly established," previous case law must have developed in a concrete factual context so as to make it obvious to a reasonable government actor that his actions violate federal law. Anderson v. Creighton, 483 U.S. 635, 107 S.Ct. 3034 (1987).

The purpose of qualified immunity is to allow government officials, or those acting under color of law, to make reasonable discretionary decisions, not just any discretionary decision, without fear of being sued. What is critical is that the official's decision must be reasonable and not be deliberately indifferent. To overcome a defendant's qualified immunity defense, plaintiffs must establish that the defendants' conduct violated a clearly established statutory or constitutional right

of which a reasonable person would have known. Mitchell v. Forsyth, 472 U.S. 511, 105 S.Ct. 2806 (1985). Qualified immunity does not exist where gross incompetence or neglect of a duty are present. It protects "all but the plainly incompetent or those who knowingly violate the law." Malley v. Briggs, 475 U.S. 335, 336, 106 S.Ct. 1092, 1093 (1986).

Not all claims arising under §1983 are governed by the same standard. "[A] court must first determine whether the plaintiff has alleged the deprivation of an actual constitutional right at all, and if so, proceed to determine whether that right was clearly established at the time of the alleged violation." Conn v. Gabbert, 119 S.Ct. 1292, 1295 (1999). See also: County of Sacramento v. Lewis, 523 U.S. 833 (1998); Hudson v. Hall, 231 F.3d 1289 (11th Cir. 2000); Santamorena v. Georgia Military College, 147 F.3d 1337 (11th Cir. 1998). "A government official will be protected from suit if the rights that he allegedly violated were unclear at the time of his actions or he reasonably believed that what he was doing did not violate clearly established law." Edwards v. Gilbert, 867 F.2d 1271 (11th Cir. 1989). See also: Russell v. Coughlin, 910 F.2d 75, 78 (2nd Cir. 1990).

"The first inquiry in any Section 1983 action is 'to isolate the precise constitutional violation with which [the defendant] is charged.' In most instances, that will be either the Fourth

Amendment's prohibition against unreasonable seizures of the person, or the Eighth Amendment's ban on cruel and unusual punishment. The validity of the claim must then be judged by reference to the specific constitutional standard which governs that right, rather than to some generalized 'excessive force' standard." Graham v. Connor, 109 S.Ct. 1865, 1870 (1989).

Where an excessive force claim arises in the context of an arrest or investigatory stop of a free citizen, it is most properly characterized as a claim invoking the protections of the Fourth Amendment. Id. at p. 1871. The Court stated:

> "Today, we make explicit what was implicit in Garner's analysis, and hold that all claims that law enforcement officers have used excessive force -deadly or not- in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard rather than under a 'substantive due process' approach." Id.

"Whenever an officer restrains the freedom of a person to walk away, he has seized that person." Tennessee, supra. A seizure is not unconstitutional unless it is unreasonable. What is unreasonable or reasonable is determined by "...balance[ing] the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion." Id. at p. 1699 (Quoting U.S. v. Place, 462 U.S. 696, 703, 103 S.Ct. 2637, 2642 (1983)). "In conducting this balancing test, we are to consider 'the scope of the particular intrusion, and the

manner in which it is conducted, the justification for initiating it, and the place in which it is conducted." Gilmere v. City of Atlanta, 774 F.2d 1495, 1502 (11th Cir. 1985) (Quoting Bell, supra at 559).

The Court in Graham held that "the 'reasonableness' of a particular force must be judged from the perspective of a reasonable officer on the scene, rather than [that of an officer] with the 20/20 vision of hindsight.... The test of reasonableness is an objective one, without regard to the underlying intent or motivation of the officer. The proper question to be asked is whether the officer's actions were objectively reasonable under the facts and circumstances confronting him." Graham, supra at p. 1872.

"The relevant dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." Saucier v. Katz, 121 S.Ct. 2151, 2156 (2001). Because the concern with respect to the qualified immunity defense is to acknowledge reasonable mistakes, the ultimate question is whether "the officer's mistake as to what the law requires is reasonable." Id. at 2158. Additionally, the Supreme Court has made clear that the reasonableness of mistakes is primarily a function of "fair warning", not factual identity. United States v. Lanier, 520 U.S. 259, 271 (1997); Hope v.

Pelzer, 122 S.Ct. 2508 (2002).

The opinions in Lanier and Hope draw a direct equation between due process and qualified immunity.

> "...the qualified immunity test is simply the adaptation of the fair warning standard to give officials (and, ultimately, governments) the same protection from civil liability and its consequences that individuals have traditionally possessed in the face of vague criminal statutes. To require something clearer than 'clearly established' would, then, call for something beyond 'fair warning.'"
> Lanier, at p. 270-71; Hope at p. 2515.

Qualified immunity operates to protect officers "[i]f the law did not put the officer on notice that his conduct would be clearly unlawful." Saucier, supra at p. 2153. Its purpose is to "...grant immunity to officers for reasonable mistakes as to the legality of their actions." Id. "Qualified immunity is 'an entitlement not to stand trial or face the other burdens of litigation.' Mitchell v. Forsyth, 472 U.S. 511, 526 (1985). The privilege is 'an immunity from suit rather than a mere defense to liability, and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial.' Ibid." (Emphasis added). Id. at p. 2156. The defense of qualified immunity must be analyzed on a case by case basis. Sheth v. Webster, 145 F.3d 1231, 1236 (11th Cir. 1998).

A defendant is required "... to establish his entitlement to qualified immunity as a matter of law by showing that no genuine issues of material fact relating to the implicated legal

questions exist." Courson v. McMillan, 939 F. 2d 1479, 1486 (11th Cir. 1991). See also: Brown v. City of Fort Lauderdale, 923 F. 2d 1474 (11th Cir. 1991); Schmelz v. Monroe County, 954 F.2d 1540 (11th Cir. 1992); Byrd v. Clark, 783 F.2d 1002 (11th Cir. 1986); Gutierrez et al. v. City of Hialeah, 729 F.Supp. 1321 (11th Cir. 1989).

Addressing the use of deadly force, the United States Supreme Court stated:

> "The use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable. It is not better that all felony suspects die than that they escape. Where the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so ... Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force. Thus, if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given." Garner, supra at p. 1701.

In Garner, an officer shot and killed a fleeing fifteen year old burglary suspect who was found with ten dollars and a purse taken from the house he had burgled. The lower court found that the deceased appeared to be unarmed, although the officer could not be certain that was the case. Significantly, Justice White's opinion for the Court concluded that "restated in Fourth

Amendment terms, this means [the officer] had no articulate basis to think [the suspect] was armed." Id. at p. 1706.

Garner is not restricted to force intended to cause death. Pruitt v. City of Montgomery, 771 F.2d 1475 (11th Cir. 1985). It extends to "force capable of causing serious personal injury." Id. at 1479-1480, n.10. In Kidd v. O'Neil, 774 F.2d 1252 (4th Cir. 1985), the court noted that while Garner deals "specifically only with the extreme example of deadly force, nevertheless [it] makes clear that the use of any significant degree of excessive force in effecting otherwise constitutionally valid arrests may constitute an unreasonable seizure of the person in violation of fourth amendment rights." Id. at 1254.

"The fact that the act to which the police responded was a criminal act does not foreclose the possibility that the officers' response was also illegal.... To conclude otherwise would give law enforcement authorities carte blanche to respond as they please to criminal activity." Vasquez v. Metropolitan Dade County, 968 F.2d 1101, 1108-9 (11th Cir. 1992). See also: Hernandez v. City of Los Angeles, 624 F.2d 935 (9th Cir. 1980).

In determining whether the conduct of the Defendant was objectively reasonable, the fact that a person was suspected of jaywalking, battery or murder is irrelevant, if excessive force was used by the law enforcement officers. Brandenburg v. Cureton, 882 F.2d 211, 215-6 (6th Cir. 1989); Vasquez, supra; Heck v.

Humphrey, 512 U.S. 477 (1994).

"The central legal question is whether a reasonably well-trained officer in the defendant's position would have known that shooting the victim was unreasonable under the circumstances.... This court has established that summary judgment is inappropriate where there are contentious factual disputes over the reasonableness of the use of deadly force." Sova v. City of Mt. Pleasant, 142 F.3d 898, 903 (6th Cir. 1998). But see: Willingham v. Loughnan, 261 F.3d 1178 (11th Cir. 2001), rev. den., 321 F.3d 1299 (11th Cir. 2003).

The Supreme Court specifically rejected the Eleventh Circuit's standard of requiring the facts of previous cases to be "materially similar" to support a conclusion that the law was clearly established, pointing to Lassiter v. Alabama A. & M. Univ., 28 F.3d 1146 (11th Cir. 1994). Id. at 2523. "In its assessment, the Eleventh Circuit erred in requiring that the facts of previous cases and Hope's case be 'materially similar'." Hope, supra at 2511.

"Although earlier cases involving 'fundamentally similar' facts can provide especially strong support for a conclusion that the law is clearly established, they are not necessary to such a finding. The same is true of cases with 'materially similar' facts." Hope, supra at 2516.

"Hope seems to have abrogated many of the other standards

articulated in Wood, as well. For example, Wood's requirement that a particular conclusion must be 'dictate[d], that is, truly compel[led]' intimates a level of absolute crystal-clear certainty about precedent that forms no part of Hope's requirements. To the degree there exists a conflict between Hope and our earlier cases, we are, of course, bound to follow the Supreme Court's intervening ruling. See Lufkin v. McCallum, 956 F.2d 1104, 1107 (11th Cir. 2000)." Holloman v. Harland, 370 F.3d 1252, 1278 (11th Cir. 2004).

"While officials must have fair warning that their acts are unconstitutional, there need not be a case 'on all fours,' with materially identical facts, before we will allow suits against them. A principle of constitutional law can be 'clearly established' even if there are 'notable factual distinctions between the precedents relied on and the cases then before the Court, so long as the prior decisions gave reasonable warning that the conduct at issue violated constitutional rights.'" Holloman, supra at 1277, citing to Lanier, supra at 277. See also: Vaughan v. Cox, 343 F.3d 1323 (11th Cir. 2003).

Moreover, Hope, supra, also made clear that the reasoning of earlier cases may provide "fair warning", even if the cases' specific holdings do not. See Hope, supra at 2512 ("The reasoning, though not the holding, in a[n earlier] case...sent the same message to reasonable officers in that Circuit.")

Even before Hope, and while still utilizing the old

"materially similar"standard, the Eleventh Circuit has acknowledged that for the law to be clearly established, "[t]he very conduct in question need not have been explicitly held to be unlawful prior to the time the official acted." Stewart v. Baldwin County Bd. of Educ., 908 F.2d 1499, 1504 (11th Cir. 1990). "Under this inquiry, the plaintiff need not point to one or more cases that resolved the precise factual issues at issue in his or her case." (Citations omitted). Nicholson v. Georgia Department of Human Resources, 918 F.2d 145, 147 (11th Cir. 1990). "Although officials need not 'predict the future course of constitutional law'...they are required to relate established law to analogous factual settings." (Citations omitted.) Stewart, supra at 1504.

> "While we have not traditionally called upon government officials to be 'creative or imaginative' in determining the scope of constitutional rights, see Adams v. St. Lucie Cty. Sheriff's Dep't, 962 F.2d 1563, 1575 (11th Cir. 1992), neither are they free of the responsibility to put forth at least some mental effort in applying a reasonably well-defined doctrinal test to a particular situation. Our precedents would be of little value if government officials were free to disregard fairly specific statements of principle they contain and focus their attention solely on the particular factual scenarios in which they arose." Holloman, supra at 1278.

"Thus, we do not just compare the facts of an instant case to prior cases to determine if a right is 'clearly established;' we also assess whether the facts of the instant case fall within statements of general principle from our precedents. See Vinyard v. Wilson, 311 F.3d 1340, 1351 (11th Cir. 2002)('When looking at

case law, some broad statements of principle in case law are not tied to particularized facts and can clearly establish law applicable in the future to different sets of detailed facts.')". (Emphasis added). Id.

The Supreme Court has stated that the qualified immunity inquiry focuses on whether the plaintiff can identify "controlling authority in [its] jurisdiction at the time of the incident which clearly established the rule on which [it] seek[s] to rely," or "a consensus of cases of persuasive authority such that a reasonable officer could not have believed that his actions were lawful." Wilson v. Layne, 526 U.S. 603, 617 (1999); Hope, supra. "Fair warning" can be demonstrated in various ways, and "...in the absence of fact-specific case law, the plaintiff may overcome the qualified immunity defense when the preexisting general constitutional rule applies 'with obvious clarity to the specific conduct in question,' and it must have been 'obvious' to a reasonable police officer that the pertinent conduct given the circumstances must have been unconstitutional at the time." (Citations omitted). Vinyard, supra at 1352. "'[G]eneral statements of the law are not inherently incapable of giving fair and clear warning, and in other instances a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though "the very action in question has [not] previously

been held unlawful." Id., citing to Hope, supra at 2516; United States v. Lanier, 520 U.S. 259, 271 (1997); Anderson, supra at 640.

"Of course, if an excessive force claim turns on which of two conflicting stories best captures what happened in the street, *Graham* will not permit summary judgment in favor of the defendant official. And that is as it should be." Saucier, supra at 2164.

Section 1983 actions based upon false arrest and malicious prosecution have been recognized by the courts to be appropriate under the Fourth and Fourteenth Amendment to the United States Constitution. Kingsland v. City of Miami, 382 F.3d 1220, 1228 (11th Cir. 2004); Hunter v. Bryant, 112 S.Ct. 534 (1991); Eubanks v. Gerwen, 40 F.3d 1157 (11th Cir. 1994); Whiting v. Traylor, 85 F.3d 581 (11th Cir. 1996); Biddle v. Martin, 992 F.2d 673 (7th Cir. 1993).

"Probable cause existed if at the moment the arrest was made...the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing a crime had been committed." Saucier, supra at 207.

Police officers have a duty to notify prosecutors of the true facts surrounding an arrest, an intentional withholding of exculpatory evidence in violation of the requirements of Brady v.

Maryland, 373 U.S. 83 (1963) is actionable under 42 U.S.C. §1983. See: Reed v. City of Chicago, 77 F.3d 1049 (7th Cir. 1996); Eubanks, supra.

> "A prosecutor's decision to charge, a grand jury's decision to indict, a prosecutor's decision not to drop charges but to proceed to trial- none of these decisions will shield a police officer who deliberately supplied misleading information that influenced the decision.... If police officers have been instrumental in the plaintiff's continued confinement or prosecution they cannot escape liability by pointing to the decisions of prosecutors or grand jurors or magistrates to confine or prosecute him. They cannot hide behind the officials whom they have defrauded." (citations omitted). Robinson v. Maruffi, 895 F.2d 649, 656 (10th Cir. 1990).

Using or planting false evidence in an effort to obtain a conviction violates the United States Constitution. Napue v. Illinois, 360 U.S. 264, 268-70 (1959); Riley v. City of Montgomery, Ala., 104 F.3d 1247, 1253 (11th Cir. 1997). The Eleventh Circuit Court of Appeals has held that it is well established that fabricating evidence violates the constitutional rights of a plaintiff. Id. Where a question of fact exists concerning the issue of fabrication, an officer would not be entitled to qualified immunity from a §1983 malicious prosecution claim. Id. at1253; Kingsland, supra at 1442.

"We cannot allow a probable cause determination to stand principally on the unsupported statements of interested officers, when those statements have been challenged and countered by objective evidence." Kingsland, supra at 1228. "[I]f the

defendants fabricated or unreasonably disregarded certain pieces of evidence to establish probable cause or arguable probable cause, as alleged, reasonable officers in the same circumstances and possessing the same knowledge as the defendants could not have believed that probable cause existed to arrest the plaintiff." Id. at 1233.

Where a Plaintiff "contends that the defendants made several deliberately false statements to support her arrest, in violation of the law" and that "the officers' conduct creates factual issues as to their honesty and credibility," the Court found that "there are questions of fact in this case regarding the integrity of the evidence which is to form the basis of an arguable probable cause determination." Id. at 1233. Therefore, whether arguable probable cause for the arrest existed is for a jury to decide. Id.

"The principles behind qualified immunity would be rendered meaningless if such immunity could be invoked to shelter officers who, because of their own interests, allegedly flout the law, abuse their authority, and deliberately imperil those they are employed to serve and protect. In fact, if the plaintiff's version of the facts is true, the defendants' conduct is patently objectively unreasonable and no reasonable public official would contend that such conduct was lawful. '[H]ad the officers . . . displayed the courtesy, professionalism, and respect citizens

have the right to expect, they would not have acted with the unbridled arrogance of those who believe they will never be held accountable for their behavior.' *O'Rourke v. Hayes*, 378 F.3d 1201, 1210 (11th Cir. 2004)." Id. at 1234.

'Plainly, an arrest without probable cause violates the right to be free from an unreasonable search under the Fourth Amendment.' *Durruthy v. Pastor*, 351 F.3d 1080, 1088 (11th Cir. 2003) (citing *Redd v. City of Enterprise*, 140 F.3d 1378, 1382 (11th Cir. 1998))..... Likewise, falsifying facts to establish probable cause is patently unconstitutional and has been so long before Kingsland's arrest in 1995. *See, e.g., Riley v. City of Montgomery*, 104 F.3d 1247, 1253 (11th Cir. 1997) ('It was well established in 1989 that fabricating incriminating evidence violated constitutional rights.'); *see also Hinchman v. Moore*, 312 F.3d 198, 205-06 (6th Cir. 2002) (citing *Hill v. McIntyre*, 884 F.2d 271, 275 (6th Cir. 1989))." Id. at 1232.

"The rule articulated by the Supreme Court in Whren provides law enforcement officers broad leeway to conduct searches and seizures regardless of whether their subjective intent corresponds to the legal justifications for their actions. But the flip side of that leeway is that the legal justification must be objectively grounded." (Citations omitted). United States v. Chanthasouxat, 342 F.3d 1271, 1279 (11th Cir. 2003).

"To determine whether an officer had probable cause to make

an arrest, a court must examine the events leading up to the arrest, and then decide 'whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to' probable cause. *Ornelas v. United States*, 517 U. S. 690, 696 (1996)." Maryland v. Pringle, 124 S.Ct. 795,797 (2003).

Qualified immunity does not suggest or demand that an officer be given the defense for conduct which is clearly illegal and in violation of a citizen's constitutional rights.

VIII. DAMAGES

It is axiomatic that civil rights actions brought pursuant to 42 U.S.C. §1983 are not intended to service as a general tort remedy. Parratt v. Taylor, 451 U.S. 527 (1981). "[A] deprivation of a constitutional right is significantly different from and more serious than a violation of a state right even though the same act may constitute both a state tort and the deprivation of a constitutional right." Monroe, supra at 196. Damages in civil rights actions relate directly to the nature of the damages available in §1983 actions, i.e. compensation for and deterrence of deprivations of constitutional rights, not state law rights. City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 266 (1981); Carey v. Piphus, 435 U.S.247, 257 n.11 (1978). Damages allowable include loss of life, the pecuniary losses of those who would have benefitted from the decedent's continued life, loss of services, parental guidance, and emotional pain and suffering. Sea Land Servs., Inc. v. Guadet, 414 U.S. 573 (1974). Actions brought pursuant to 42 U.S.C. §1983 and §1988 provide that "...both federal and state rules on damages may be utilized, whichever better serves the policies expressed in the federal statutes." Sullivan v. Little Hunting Park, 396 U.S. 229, 239-40 (1969).

A Florida court held that "[t]he test for determining the proper damage standard is whether application of the state law

would be inconsistent with the federal policy underlying the cause in question.... The policies underlying §1983 include compensation of persons injured by deprivation of federal rights and prevention of abuses of power of those acting under color of state law." (Emphasis added). Heath v. City of Hialeah, 560 F.Supp. 840, 843 (S.D. Fla. 1983). The court went on to state:

> "The federal remedy supplements the state remedy, and the latter need not be first sought and refused before the federal one is invoked. The independent vitality of 42 U.S.C. §1983 has been reaffirmed many times by the Supreme Court. *Carey v. Piphus*, 435 U.S. 247, 98S.Ct. 1042, 55 L.Ed.2d 252 (1978)." Id. at p.844.

The Florida Wrongful Death Act has eliminated claims for pain and suffering of the decedent from the time of injury to the time of death, however, the decedent's close surviving relatives are allowed recovery for their personal pain and suffering. Florida Clarklift, Inc. v. Reutimann, 323 So.2d 640 (Fla. 2nd DCA 1976). Section 768.21, Florida Statutes, specifies the damages allowable under Florida's Wrongful Death Act. Section 768.21(4), F.S. states, in relevant part: "[E]ach parent of an adult child may also recover for mental pain and suffering if there are no other survivors." Additionally, Section 768.24, F.S., states: "A survivor's death before final judgment shall limit the survivor's recovery to lost support and services to the date of his or her death...." Therefore, State law would preclude damages with respect to the decedent's right to life and his pain and suffering prior to death, as well as, his parents' pain and

suffering as a direct result of his or her death. Such restrictions are inconsistent with Section 1983 actions.

Section 1983 actions include compensation of persons injured by deprivation of federal rights and prevention of abuses of power by those acting under color of state law. Robertson v. Wegmann, 436 U.S. 536 (1978). In Bell v. City of Milwaukee, 746 F.2d 1205 (7th Cir. 1984), the court held that Wisconsin's survival statute was inconsistent with the underlying purpose of deterrence because the statute did not provide for recovery of loss of life damages. The court made the observation that "...if section 1983 did not allow recovery for loss of life notwithstanding inhospitable state law, deterrence would be further subverted since it would be more advantageous to the unlawful actor to kill rather than injure." Id. at 1239. See generally: McFadden v. Sanchez, 710 F.2d 907 (2d Cir. 1983); Hudson v. Kelly, No. 98C7847 (N.D. Ill., Eastern Div. 1999); Tracy v. Bittles, 820 F.Supp. 396 (N.D. Ind. 1993); Sager v. City of Woodland Park, 543 F.Supp. 282 (D.C.Colo. 1982); Guyton v. Phillips, 532 F.Supp. 1154 (N.D. Cal. 1981); Berry v. City of Muskogee, 900 F.2d 1489 (10th Cir. 1990); Gilmere, supra.

In Felder v. Casey, 487 U.S. 131, 139 (1988) quoting Burnett v. Grattan, 468 U.S. 42, 55 (1984), the United States Supreme Court stated: "As we have repeatedly emphasized, 'the central objective of the Reconstruction Era civil rights statutes . . .

is to ensure that individuals whose federal constitutional or state rights are abridged may recover damages or secure injunctive relief." In rejecting the damages limitation under the Florida Wrongful Death statute, the federal court in the Southern District of Florida opined that: "This section, as applied to plaintiff [the mother of a fully emancipated male who was killed by the police] would bluntly speaking, offer little more than the cost of a casket." Heath, supra at p. 842. It went on to state that:

"At bottom, §1983 was the product of a vast transformation in the concepts of federalism ... The very purpose of §1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights - to protect the people from unconstitutional action under color of state law ... This Court has neither the inclination nor the power to reverse that process in chase of some formalistic symmetry. Considerations of deterrence and federal supremacy, as well as justice, require us to grant plaintiff's motion. Hereafter, the federal common law will govern any future assessment of damages in this case." Id. at 844.

The United States Supreme Court, in Carlson v. Green, 446 U.S. 14 (1980), held that state law should be looked to initially, but refused to follow state policies that would prohibit a Bivens action against federal defendants from

surviving where death results. Florida has also held in section 1983 cases that state law is preempted by federal law under several circumstances. The seemingly seminal case on this issue is Moran v. City of Lakeland, 694 So.2d 886 (Fla. 2d DCA 1997). In Moran, the Second District reversed a trial court order awarding attorney's fees against plaintiffs after granting summary judgment to defendants in a section 1983 claim (after an offer of judgment was made by defendants and rejected by plaintiffs). The Second District, relying on Felder v. Casey, 487 U.S. 131 (1988) and Free v. Bland, 369 U.S. 663 (1962), held that "[u]nder the Supremacy Clause of the United States Constitution, a federal law preempts a state law where the two conflict." Id. at 886. The court reasoned that under section 1988, the award of attorney's fees to a prevailing defendant is much more restricted than under Florida's section 768.79(1), and that Section 1988 preempts 768.79(1).

> "In Howlett v. Rose, 496 U.S. 356, 110 S.Ct. 2430, 110 L.Ed. 2d 332 (1990), the United States Supreme Court ruled that a state notice-of-claim statute that effectively shortened the statute of limitations and imposed an exhaustion requirement on claims against public agencies and employees was preempted insofar as it applied to 42 U.S.C. section 1983 actions. [**4] Felder v. Casey, 487 U.S. 131, 108 S. Ct. 2302, 101 L. Ed. 2d 123 (1988). Thus, federal law preempts Florida from imposing a notice-of-claim requirement on appellant that effectively shortens to three years the four-year statute of limitations. The trial court erred in dismissing appellant's complaint based upon alleged

noncompliance with the notice requirements of §768.28 Florida Statutes." Brooks v. Elliott, 593 So.2d 1209-1210 (Fla. 5th DCA 1992).

See also: Chapman v. Laitner, 809 So.2d 51 (3d DCA 2002)(remanding case to trial court for a determination of entitlement of attorney's fees under 42 U.S.C. section 1988, not F.S. 768.79); Clayton and McCulloh v. Bryan and Bryan, 753 So.2d 632 (Fla. 5th DCA 2000)(finding that the Florida offer of judgment statute is preempted by the provisions of 15 U.S.C. section 1692 (Federal Fair Debt Collection Protection Act); Sanchez v. Degoria, 733 So.2d 1103 (Fla. 4th DCA 1999)(holding that plaintiff was not required to seek leave of court prior to pleading punitive damages claim (required under Chapter 768, Florida Statutes) for alleged section 1983 violation; in this case, court extensively discusses distinctions between state procedural laws and those that impede the vindication of federal rights).

In O'Loughlin v. Pinchback, 579 So.2d 788 (1st DCA 1991), the court discussed preemption and its application. In O'Loughlin, the First District held that Florida's law stood "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress by not recognizing that discrimination against pregnant employees is sex-based discrimination." Id. at 792. It went on to state that: "Florida Human Rights Act, specifically section 760.10,

Florida Statutes, is pre-empted by Title VII of the Civil Rights Act of 1984, 42 U.S.C. section 2000e-2 to the extent that Florida's law offers less protection to its citizens than does the corresponding federal law." Id.

Therefore, under 42 U.S.C. §1983, a plaintiff's recoverable damages would be governed by federal common law and not the more restrictive Florida Wrongful Death Statute.

II. Notice and Pre-Suit Discovery Requirements

Pre-Suit - Notice of Intent Letter

Dear Police Chief/City Manager:

Pursuant to Florida Statutes, Chapter 768.28, notice is hereby given of our intent to bring a lawsuit on behalf of John Doe for damages suffered as a result of his arrest on (date of arrest) by members of your city police department.

This notice applies to the City, the officials of the City, and the appropriate police officers of the City's Police Department.

The following documents, now being the subject of litigation, may not be destroyed, pursuant to Florida law:

1. Complaints of police misconduct.
1. Investigations of possible police misconduct.
2. Letters of intent to sue based on claims of police misconduct.
3. Documents reflecting settlements or releases relating to allegations of police misconduct.
4. Disciplinary measures imposed against members of your police department.
5. Personnel files of members of your police department.
6. Any investigations, tapes and/or police reports concerning the arrest at issue.

Very truly yours,

Barbara A. Heyer

Certified Mail No. - Return Receipt Requested

EXHIBIT A

§119 Request

Dear Police Chief/City Manager:

Pursuant to Florida Statutes, Chapter 119, I am requesting that the following materials be made available for my review:

1. Any logbooks, lists, or other materials in your possession or control reflecting complaints of police misconduct. These materials shall include complaints, whether investigated or not, and whether filed by civilians or internally, covering the period of (5) years prior to incident at issue.

2. All policy and procedure manuals in effect during the year of the incident at issue.

3. All documents reflecting the incident at issue. These materials shall include all statements, photographs, reports, videotapes, witness lists, lists of persons interviewed, supervisory and self evaluations, etc. obtained.

4. All documentation reflecting the follow-up investigation of the incident at issue. These materials shall include all reports or other materials prepared in anticipation of, or as a result of, any such investigation including all statements, photographs, reports, videotapes, witness lists, lists of persons interviewed, etc.

5. The personnel files of all police officers who were involved in the incident at issue. These files shall include those of supervisory personnel as well as the actual participants in the incident at issue.

Please have these materials available for my review by —.

Very truly yours,

Barbara A. Heyer

Certified Mail No. - Return Receipt Requested

EXHIBIT B

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